Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL ASBURY AND KATHRYN ASBURY,
PARENTS OF DANIEL ASBURY,
Petitioners,

v.

MISSOURI DEPARTMENT OF
ELEMENTARY AND SECONDARY EDUCATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Since the enactment of the Education for All Handicapped Children Act of 1975, now called the Individuals with Disabilities Education Act, Congress has required states to "ensure that all personnel necessary" to the education of children with disabilities "are appropriately and adequately prepared" by "acquiring and disseminating . . . significant knowledge derived from education research" and "adopting, where appropriate, promising practices." 20 U.S.C. §1413(a)(3) (pre-1997); 20 U.S.C. §§1412(a)(14), 1453(c)(3)(D)(vii) (1997). This Court, in *Board of Educ. of the Hendrick Hudson Central Schl. Dist. v. Rowley*, 458 U.S. 176 (1982), adopted a deferential standard for reviewing state and local decisions regarding the choice of educational methods for individual children with disabilities, conditioned, however, upon the state's compliance with its statutory responsibilities, *inter alia*, to ensure that personnel have been properly prepared with the knowledge needed to make such choices. 458 U.S. at 206-207. In this case the Eighth Circuit adopted a rule of deference but erroneously failed to enforce the statutory safeguards upon which this Court indicated the rule of deference depends. The lower court did so by ruling that it had no authority to address the state's failure to comply with the statutory requirements that pertain to personnel development.

The question presented is whether a court has the authority to review a state's compliance with its personnel development duties under the Individuals with Disabilities Education Act.

TABLE OF CONTENTS

Question Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdictional Statement	1
Statutes Involved	1
Statement of the Case	5
Reasons for Granting the Writ	13
Conclusion	21
Appendix	A-1

TABLE OF AUTHORITIES

Cases Page(s)

Board of Educ. of the Hendrick Hudson Central Schl. Dist. v. Rowley, 458 U.S. 176, 207 (1982) ..... i, 5, 13, 17, 18

Corey H. v. Board of Educ. of the City of Chicago, 995 F. Supp. 900, 913 (N.D. Ill. 1998) 15

Delaware County Intermediate Unit No. 25 v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993) 7

Malkentzos v. DeBuono, 923 F.Supp. 505 (S.D.N.Y. 1996) 7

Mr. X v. New York State Education Department, 975 F.Supp. 546, 558-59 (S.D. N.Y. 1997) .. 7

New York State Educational Association for Retarded Children v. Carey, 612 F.2d 644, 648 (2nd Cir. 1979) 18

Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3rd Cir. 1988) 18

Timothy W. v. Rochester, New Hampshire, Schl. Dist., 875 F. 2d 954, 973 (1st Cir. 1989) 20

Statutes

20 U.S.C. §§1400, *et seq.* (IDEA) 12

20 U.S.C. §1400(c)(4) 16

20 U.S.C. §1400(c)(5) 14, 16

20 U.S.C. §1412 (1997) 1, 2, 3

20 U.S.C. §1412(a)(14) i

20 U.S.C.§1413(a)(3) (pre-1997) ..... i, 1, 2, 14

20 U.S.C. §1415 12

20 U.S.C. §1415(f)(1) (1997) 11

20 U.S.C. §1435(a)(8) 3

20 U.S.C. §1453 (1997) 3, 4

20 U.S.C. § 1453 (b)(2)(B) 3

20 U.S.C. §1453 (c)(3)(D)(vii) (1997) ..... i, 3

20 U.S.C. §1476(b)(8) 1

28 U.S.C. §1254(1) 1

28 U.S.C.§1331 12

28 U.S.C. § 1343 12

Education of All Handicapped Children Act of 1975 15

Other Authorities

S. Rep. No. 94-168, p. 9 (1975) 15

U.S. Code Cong. & Admin. New 1975, p. 1433 . 15

OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on April 18, 2001, can be found at 248 F.3d 1163, 2001 U.S. App. LEXIS 7074. A copy of that Opinion and the unpublished Memorandum and Order of the United States District Court for the Eastern District of Missouri, rendered May 9, 2000, are reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Eighth Circuit Court of Appeals entered its Opinion and Judgment on April 18, 2001. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

When this lawsuit was filed, the relevant provisions of the Individuals with Disabilities Education Act provided:

Section 1413 State Plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in Sec. 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

* * *

(3) describe, consistent with the purposes of this chapter and with the comprehensive system of personnel development described in Sec. 1476(b)(8) of this

title, a comprehensive system of personnel development that shall include—

(B) a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this subchapter are appropriately and adequately prepared, including—

* * *

(ii) procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(iii) procedures for adopting, where appropriate, promising practices, materials, and technology.

20 U.S.C. §1413 (pre-1997).

Effective July 1, 1998, as part of the 1997 amendments to the Individuals with Disabilities Education Act, those provisions were amended. The relevant personnel development provisions now provide:

Section 1412 State Eligibility

(a) In general.

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

* * *

(14) Comprehensive system of personnel development.

The State has in effect, consistent with the purposes of this chapter and with Sec. 1435(a)(8) of this title, a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel that meets the requirements for a State improvement plan relating to personnel development in subsections (b)(2)(B) and (c)(3)(D) of Sec. 1453 of this title.

20 U.S.C. §1412 (1997).

Among the provisions incorporated into that section is the following requirement:

Section 1453 Applications

* * *

(c) Improvement strategies

Each State improvement plan shall—

* * *

(3) describe the strategies the State will use to address the needs identified under subsection (b) of this section, including—

* * *

(D) how the State will address the identified needs for in-service and pre-service preparation to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the

needs of children with disabilities, including a description of how—

* * *

(vii) the State will acquire and disseminate, to teachers, administrators, school board members, and related services personnel, significant knowledge derived from educational research and other sources, and how the State will, when appropriate, adopt promising practices, materials, and technology.

20 U.S.C. §1453 (1997).

STATEMENT OF THE CASE

1. Petitioners are the parents of a child with autism, Daniel Asbury. They brought this case to challenge the conduct of respondent Missouri Department of Elementary and Secondary Education (DESE) in its role as state agency responsible for Missouri's compliance with the Individuals with Disabilities Education Act (IDEA). The Asburys complain that DESE failed and continues to fail to provide the personnel of the public school districts in Missouri with the information and resources that the IDEA requires and that the public schools need for the appropriate education of children like their son Daniel. This case is based on the obligations of the "States" prescribed by Congress in the IDEA and recognized by this Court in its seminal case under the Act, *Board of Educ. of the Hendrick Hudson Central Schl. Dist. v. Rowley*, 458 U.S. 176, 207 (1982): "The Act expressly charges States with the responsibility of 'acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research . . . and [of] adopting, where appropriate, promising educational practices.'"

2. The district court granted summary judgment for the state because the court believed it had no authority to evaluate the state's procedures or judge the quality of its compliance efforts. For example, the court found, "nothing in the relevant statutory or regulatory provisions at issue which limit the manner in which defendant must disseminate the information." Order 5/9/00 App. A-84. With respect to the state's duty to adopt promising practices, the district court also believed it could not assess the state's conduct, as long as the state had a procedure on the books: "Regardless of whether

the Court finds them reasonable, however, the fact that such a procedure exists is sufficient for the Court to conclude that defendant has satisfied any duties it has to ensure that promising practices are adopted." App. A-85. Similarly, with respect to teacher training, the court held that the facts that "Project ACCESS distributes information and holds training sessions with respect to children with autism. . . . are sufficient to establish" compliance with IDEA's requirements. App. A-94-95. The Eighth Circuit affirmed "on the basis of the district court's . . . decision." Order 4/18/01, App. A-2.

3. Dissatisfied with Daniel's lack of progress after two years in the public school system, petitioners conducted some educational research on their own. At their local county library they discovered a method of educating children with autism that appeared extremely promising, using the principles of Applied Behavior Analysis (ABA) in a one-on-one program of discrete trial training (DTT). Research published in 1987 shows that 47% of children who receive an intensive ABA program recover permanently from their autism, another 42% of those children improve significantly, and most of the remaining children achieve some improvement. The research shows that the children who "recover" from their autism are able to attend regular classrooms with no further special education services and become indistinguishable from the non-disabled children in their classes.[1]

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[1] The 1999 Report of the Surgeon General of the United States on Mental Health, in Chapter 3, indicates: "Thirty years of research demonstrated the efficacy of applied behavioral methods" for children with autism. It describes the 1987 and 1993 ABA research by Dr. Lovaas and his colleagues as a "well-designed study." *See* http://www.surgeongeneral.gov/library/mentalhealth/chapter3/sec6.html. ABA has been described and found to be appropriate for specific children with autism in several court

Continued on next page

The Asburys arranged for Daniel to have a program of applied behavioral therapy in their home. After Daniel achieved some significant success, the Asburys notified the school district of their discovery and requested that the district fund the home program and integrate it with the services Daniel was receiving at school. The school district's refusal to provide Daniel the type of program his parents requested, or any other program that offered similar promise, led to the dispute that brings the Asburys to this Court.

After exhausting their administrative remedies and settling their claims against their school district, petitioners brought this lawsuit, claiming that the state agency, defendant DESE, failed to fulfill its statutory obligations to provide local school districts with the information they need to make informed choices.

4. The evidence in this case viewed in the light favorable to petitioners shows that respondent Missouri

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Footnote 1 continued.

decisions. *E.g., Malkentzos v. DeBuono*, 923 F.Supp. 505 (S.D.N.Y. 1996), *remanded on other grounds*, 102 F.3d 50 (2d Cir. 1996); *Mr. X v. New York State Education Department*, 975 F.Supp. 546, 558-59 (S.D. N.Y. 1997); *Delaware County Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206 (E.D. Pa. 1993). As the district court explained in *Malkentzos v. DeBuono*:

> In recognition of the autistic child's inability to learn as others do, ABA breaks down activities into discreet individual tasks, and rewards accomplishment. Eventually, the child learns to integrate information and associate instruction with a given activity. ABA is not administered indefinitely; usually after two or three years the child acquires learning skills and can proceed to more traditional education.

923 F.Supp. at 509 (citations omitted).

Department of Elementary and Secondary Education failed to disseminate any significant knowledge derived from education research and failed to adopt any promising practices regarding the education of children with autism. Instead, DESE distributed outdated and erroneous information indicating that the vast majority of such children are and are likely to remain mentally retarded and unable to communicate. While it did not adopt any particular practice, DESE promoted educational practices that either are without any support in research or have been shown to be ineffective in the published literature.

In response to the state's motion for summary judgment, petitioners presented the expert testimony of Dr. Tristram Harry Smith, of the Department of Psychology, Washington State University, to testify about his and Dr. O. Ivar Lovaas' research concerning the appropriate treatment and education of preschool and young school aged children with autism. Dr. Smith was involved in both the 1987 and 1993 Lovaas research studies. He explained that these studies were published in peer-reviewed journals of long professional standing. The purpose of peer review was to obtain independent assurance that the research is of technically sound quality. Dr. Smith testified that the publication of five peer commentaries on the 1993 study was an unusual mark of the study's distinction.

In contrast to the practice of educating children with autism with intense one-to-one ABA services, Dr. Smith opined that the prognosis of a preschool child with autism is that they don't improve and remain "really pretty impaired." Dr. Smith also opined that the prognosis when given the ABA treatment is "significantly better," but with "big individual differences in the outcome."

Petitioners also presented the testimony of expert witness Dr. Patricia M. Meinhold regarding the ABA research and Missouri's dissemination of information regarding educating children with autism. Dr. Meinhold described the Lovaas 1987 research as "one of the best controlled and conducted research evaluations in the literature on the treatment and education of children with Autism" and she noted that it "has received unprecedented attention in the field since its publication over ten years ago." She noted that DESE "relies heavily" on a subcontractor, Project ACCESS for dissemination of information about educating children with autism: "specialized teacher training, a library of treatment and educational materials, consultations to teachers, and workshops, all concerned with the education and treatment of students with Autistic Disorder." She explained that contrary to DESE and ACCESS's ideology or assumptions about children with autism having a predictable course that must be supported, accommodated and accepted, "Lovaas and his colleagues have convincingly demonstrated that early intensive environmental events (discrete trial treatment) can produce dramatically different outcomes despite the likely neurological underpinnings of the disorder."

Dr. Meinhold concluded that while "ACCESS staff were aware of the existence of the Lovaas 1987 outcome study, the 1993 follow up of those subjects and related research reports," for some reason that she was unable to discern, "they chose to withhold these extraordinary empirical findings from parents and teachers seeking advice about effective interventions for preschoolers with Autism." Dr. Meinhold was unable to understand "why DESE chose not to disseminate this most promising intervention on their own once they became aware

of it, and once they became aware that it was not represented in the ACCESS program material." In her concluding remarks, Dr. Meinhold stated: "Although the ACCESS program (and relevant DESE administrators and staff) were clearly aware of the Lovaas and related outcome studies in the early 1990's, they do not appear to have been in support of this extraordinarily effect (sic) treatment and did not distribute the relevant features of this research to parents and staff."

According to Dr. Meinhold, not only did DESE and ACCESS choose not to disseminate the positive information about the Lovaas research findings, what they did disseminate about it was inaccurate. "Inaccuracies were sometimes so significant that frank misinformation about behavior analysis in general and discrete trial training in particular was presented as expert training to DESE staff and parents."

Dr. Meinhold stated that the information that has been disseminated by DESE, through Project ACCESS is seriously deficient:

> DESE has been relying on a highly selective sampling of these resources and relying on an often inaccurate characterization of the state of the science in Autism education and treatment. This has caused them to remain far from their goal (and mandate) of providing students with Autistic Disorder effective programs of education and related services.

Dr. Meinhold explained that from the ACCESS materials she "was able to detect an ideology (or set of assumptions) about students with Autistic Disorder and their needs" that features support over change of behaviors, focuses on adjustments and accommodations

and teaches "Acceptance of the disability" as a "primary goal for the students and families."

Dr. Meinhold described the "specific treatment and educational technologies . . . which are prominently featured in ACCESS materials," and concluded that while "DESE and ACCESS claim to select and disseminate educational practices that are 'effective and data based,'" the procedures they support and adopt are neither. Instead, Dr. Meinhold stated that with minor exceptions, the procedures disseminated by ACCESS "are entirely without peer reviewed, published scientific support. In fact, in some instances they have been shown to be *ineffective* in peer reviewed, published scientific work."

The expert witnesses hired by the Missouri Department of Elementary and Secondary Education agreed with many of the principles espoused by petitioners' experts. Dr. B. J. Freeman testified about the importance for children with autism of receiving "intense intervention" and ABA services; "there is no question—early intervention using applied behavior analysis is an important part of a program for any child with autism." Respondent's experts also agreed that the information disseminated by DESE and Project ACCESS about poor prognosis for children with autism is wrong. According to Dr. Freeman, "there is still a lot of misinformation out there, that the prognosis for children with autism is poor." Dr. Freeman agreed with petitioners' experts that "the reality is the prognosis for children with autism is pretty good with intervention."

5. Pursuant to the IDEA, 20 U.S.C. §1415(f)(1) (1997), the Asburys initiated an administrative complaint in 1997 in an attempt to resolve their disagree-

ment with their local school district, the Special School District of St. Louis County, and defendant DESE. In May 1998 the Asburys entered into a settlement agreement with the Special School District of St. Louis County (SSD) providing for an Applied Behavioral Analysis educational program for Daniel in the Asburys' home, calling for the use of ABA trained paraprofessionals to work with Daniel in SSD classrooms, and paying the Asburys a total of $133,000.00 in damages, reimbursement, and attorneys' fees. Also in May 1998 the administrative complaint against defendant DESE was dismissed.

In June 1998 the Asburys filed this lawsuit against defendant DESE. The trial court, Judge E. Richard Webber, ruled in January 1999 that plaintiffs stated legitimate claims for relief under both the IDEA and the Rehabilitation Act. In May 2000, however, the court granted DESE's motion summary judgment and dismissed all of plaintiffs' claims.

Petitioners brought this action in the United States District Court for the Eastern District of Missouri on the grounds that respondent violated the substantive and procedural requirements of the Individuals with Disabilities Education Act, 20 U.S.C. §§1400, *et seq*. (IDEA). The district court had subject matter jurisdiction pursuant to 20 U.S.C. §1415 and 28 U.S.C. §§1331 and 1343.

REASONS FOR GRANTING THE WRIT

The local public schools are dependent upon the state education agency for doing its part to ensure that children with disabilities receive an appropriate education. According to the lower courts' interpretation of the IDEA, however, as long as the state delivers some information, the state is free to leave the school districts in the dark about clearly significant educational research and promising practices, free to train teachers to educate children using methodologies that have been proven to fail, and, even if it is wrong, free to train teachers that most children with autism are mentally retarded and are not likely to improve. That is not what Congress intended when it passed the IDEA and it is contrary to the rationale behind this Court's decision in *Rowley*.

In addition to the general importance of the courts' authority to evaluate the states' compliance with their personnel development duties under the IDEA, the issues in this case are particularly compelling because they involve the education of children with autism. The number of children being diagnosed with autism is growing rapidly.[2] The consequences of an ineffective education for these children are devastating. With the interventions that are supported by educational research nearly half of the children with autism can grow to be indistinguishable from their peers and become productive, independent citizens. Without such interventions, the vast majority of children with autism will

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[2] According to *Newsweek*, "In the 90's, the national demand for autism services rose 556 percent." http://www.msnbc.com/modules/newsweek/talk/436635.asp.

spend their lives in institutions or other restrictive facilities, forever dependent upon the support of taxpayers.

The lower courts erred when they held that the state's performance of its IDEA personnel development duties is not subject to judicial oversight. To the contrary, the language of the statute, its legislative history, and its interpretation by this Court, all establish that the personnel development duties are mandatory and enforceable. Moreover, those duties are essential to the core purpose of the IDEA to provide the school districts with the means to provide effective educational services to enable children with disabilities to "meet developmental goals" and "be prepared to lead productive, independent, adult lives." 20 U.S.C. §1400(c)(5). All courts have interpreted the IDEA to make enforceable against the states the duties that are specifically assigned to the states.

I. The Decisions Below Conflict with the Language of the IDEA and its Legislative History

The language and legislative history of the IDEA indicate that the states' duties to help the school districts provide meaningful and effective educational programs have substance and are enforceable. Congress did not give the states complete and unfettered discretion to carry out their personnel development activities as they see fit, but required the states to implement a system "to ensure . . . all personnel . . . are appropriately and adequately prepared" to do their jobs. 20 U.S.C. §1413(a)(3)(B) (pre-1997). "[T]he statutory language of Part B of the IDEA, by repeatedly using the word 'ensure,' unambiguously requires the state 'to make certain' that the IDEA's statutory requirements are

carried out." *Corey H. v. Board of Educ. of the City of Chicago*, 995 F. Supp. 900, 913 (N.D. Ill. 1998).

Congress did not leave it to the states to decide what information to distribute, but specified that they must disseminate "significant knowledge derived from education research," and they must have procedures for adopting "where appropriate, promising practices." *Id.*

In the legislative history of the original enactment of the Education of All Handicapped Children Act in 1975 (the precursor to IDEA), Congress said:

> The long range implications of these statistics [regarding children with disabilities] are that public agencies will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally accepted lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence thus reducing their dependence on society.

S. Rep. No. 94-168, p. 9 (1975), U.S. Code Cong. & Admin. News 1975, p. 1433.

Over 20 years later, when it amended and reauthorized the IDEA in 1997, Congress reiterated that theme and criticized the states for failing to heed it. Congress expressed serious concerns over the lack of compliance in the areas at issue in this case:

> [T]he implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of

> teaching and learning for children with disabilities. 20 U.S.C. §1400(c)(4).

Congress noted that "[o]ver 20 years of research . . . has demonstrated that the education of children with disabilities can be made more effective," among other ways by, "having high expectations for such children . . . strengthening the role of parents . . . coordinating this Act with other local, educational service agency, State, and Federal school improvement efforts . . . [and] supporting high-quality, intensive professional development for all personnel who work with such children." 20 U.S.C. §1400(c)(5). Congress stated quality teacher training – including the dissemination of significant information – would provide the kind of direct and dramatic benefits that Dr. Lovaas, Dr. Smith, and others have shown is within the reach of children with autism. Congress envisioned that proper teacher training, based on the research that has been performed in the last 20 years, would "ensure that [children with disabilities] have the skills and knowledge necessary to enable them—

> (i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and
>
> (ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible."

20 U.S.C. §1400(c)(5).

II. Certiorari is Warranted Because the Decisions Below Conflict with Decisions of This Court and of Other Circuits

In determining whether a child was provided a free appropriate public education under the IDEA, this Court emphasized the importance of the exact requirements at issue in this case. *Board of Educ. of the Hendrick Hudson Central Schl. Dist. v. Rowley*, 458 U.S. 176, 206-208 (1982).[3] The Court explained that the development of a child's educational program and choice of the most suitable methodology is the "primary responsibility" of "state and local educational agencies in cooperation with the parents." 458 U.S. at 207. But in order to fulfill that primary responsibility, the Court recognized that "States" must first fulfill their own statutory obligation to provide the local school district educators with the information they need to make informed choices: "The Act expressly charges States with the responsibility of 'acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research.'" *Id.* In addition, the Court noted that the IDEA gave "States" the duty to adopt promising educational practices, where they are appropriate. *Id.* Only if the state, defendant DESE in this case, has met its obligations to disseminate significant information from educational research and to adopt promising practices, is a state's or local school district's development of an educational program or choice of methodology entitled to deference by a reviewing court.

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[3] The lower courts in this case decided that they lacked the authority to evaluate the state's compliance with the personnel development duties of the IDEA, without even mentioning this Court's *Rowley* decision.

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." Section 1413(a)(3).

Rowley, 458 U.S. at 207.

The *Rowley* Court did not enunciate an isolated rule that "questions of methodology are for resolution by the State." Rather, in Justice Rehnquist's majority opinion, the Court stated that, "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." 458 U.S. at 208. The difference between the two formulations is vital, and the judicial duty to determine whether the requirements of the IDEA have been met is an indispensable prerequisite to the invocation of the rule of deference.

The rule that deference under the IDEA is warranted only after a determination of compliance with the statutory requirements has been articulated by other courts of appeal. *See, e.g., Polk v. Central Susquehanna Inter-*

mediate Unit 16, 853 F.2d 171, 184 (3rd Cir. 1988) ("we do not read the Supreme Court's salutary warnings against interference with educational methodology as an invitation to abdicate our obligation to enforce the statutory provisions that ensure a free and appropriate education to Christopher"); *New York State Educational Association for Retarded Children v. Carey*, 612 F.2d 644, 648 (2nd Cir. 1979) ("In many contexts the reasoned decision-making of administrators bearing sensitive responsibilities is entitled to judicial deference. However, the courts are also assigned a sensitive task, and that task is to ensure that established legal standards . . . are followed by government agencies.")

The First Circuit recognized the importance of the state's obligations to keep its school personnel informed and educated as to developments in educational methodologies. Under the IDEA the concept of an "appropriate" education is not—and is not intended to be—static. An educational practice that is fully appropriate at one point in time can be rendered inappropriate by developments in educational research. As the First Circuit explained in holding that even the most severely impaired children are entitled to an education under the IDEA:

> The law explicitly recognizes that education for the severely handicapped is to be broadly defined, to include not only traditional academic skills, but also basic functional life skills, and that educational methodologies in these areas are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs.

Timothy W. v. Rochester, New Hampshire, Schl. Dist., 875 F. 2d 954, 973 (1st Cir. 1989).

It is unthinkable that Congress and this Court intended that the education of a child with a disability be limited to the particular methodology that happens to be within the knowledge of the teacher to which the child has been assigned. The IDEA requires that the states ensure the dissemination of significant knowledge that has been researched and developed in colleges and universities and that the states adopt practices that are promising. The decisions of courts below allow the states to disregard those fundamental statutory requirements.

CONCLUSION

For the reasons stated above the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-2510

Michael Asbury; Kathryn Asbury,
parents of Daniel Asbury;
Plaintiffs-Appellants,
United States of America,
Intervenor Plaintiff,
v.
Missouri Department of Elementary
and Secondary Education,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.
[UNPUBLISHED]

Submitted: April 12, 2001
Filed: April 18, 2001

Before BOWMAN and FAGG, Circuit Judges, and VIETOR*, District Judge.

PER CURIAM.

The parents of Daniel Asbury, an autistic child, brought this action under the Individuals with Disabilities Education Act and the Rehabilitation Act against

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* The Honorable E. Richard Webber, United States District Judge for the Eastern District of Iowa, sitting by designation.

the Missouri Department of Elementary and Secondary Education (DESE). The Asburys allege the DESE violated its duty to prepare its personnel to evaluate and educate children with autism by acquiring and disseminating knowledge and adopting appropriate practices. According to the Asburys, this failure contributed to a delay in Daniel's diagnosis and in the implementation of appropriate services for him. The district court** granted summary judgment in favor of the DESE. On appeal, the Asburys argue the district court committed error in granting summary judgment. Having carefully reviewed the record, we disagree and affirm on the basis of the district court's thorough, 101-page decision. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

** The Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MICHAEL ASBURY and KATHRYN ASBURY,
parents of DANIEL ASBURY,
Plaintiffs,
vs.
MISSOURI DEPARTMENT OF ELEMENTARY
and SECONDARY EDUCATION,
Defendant.

Case No. 4:98CV01019 ERW

FILED MAY 9, 2000
U.S. DISTRICT COURT
E. DISTRICT OF MO.
ST. LOUIS

MEMORANDUM AND ORDER

This matter is before the Court upon defendant's Motion for Summary Judgment [Document #51]. Plaintiffs claim that defendant has, by inadequacies in its procedures and policies, violated the Individuals with Disability Education Act, 20 U.S.C. § 1400, *et seq*. [THE "IDEA"], its implementing regulations at 34 C.F.R. 300, *et seq*., and Section 504 of the Rehabilitation Act and its implementing regulations at 34 C.F.R. 100, *et seq*. Defendant moves for summary judgment on all of plaintiffs' claims. First, defendant claims that plaintiffs' claims must fail on the ground that such claims are barred by the Eleventh Amendment to the United

States Constitution.[1] Second, defendant claims that it may not, in its supervisory role, be held liable in the manner requested by plaintiffs. Third, defendant claims that plaintiffs are unable to adduce a genuine issue of fact that would preclude the granting of summary judgment in favor of defendant. Having considered the arguments and the undisputed facts set forth by the parties, the Court concludes that defendant is entitled to summary judgment on all of plaintiffs' claims for the reasons that follow.

I. STATEMENT OF RELEVANT FACTS.

A. PLAINTIFFS' ALLEGATIONS IN THEIR COMPLAINT.

Plaintiffs Michael Asbury and Kathryn Asbury are the parents of Daniel Asbury. Daniel was born June 29, 1991. Plaintiffs allege that Daniel has, at all material times, legally resided in the Maplewood-Richmond Heights School District in Maplewood, St. Louis County, Missouri. Daniel was allegedly first referred to the Maplewood-Richmond Heights School District and the Special School District of St. Louis County (the "Special School District" or "SSD") as a preschool child with special needs as early as January of 1993, when, at about 30 months of age, Daniel allegedly displayed signs and symptoms sufficient to raise a reasonable suspicion of educational autism.

Plaintiffs allege that in 1987, four years before Daniel was born, and again in 1993, when they allege Daniel was failing to progress in special education, O. Ivar Lovaas of U.C.L.A. published promising research con-

[1] With respect to this issue, the United States has filed an amicus brief in opposition to defendant's Motion.

cerning the methodology known as Applied Behavior Analysis or Discrete Trial Training (the "Lovaas methodology"). Plaintiffs allege that the Lovaas research showed that the application of such methodology, when appropriately implemented as 1:1 instruction, for 40 hours per week, year round, between the ages of 3 to 5 years, results in the following:

(1) 47% of children recovering permanently from their autism to achieve fully mainstreamed school placement;

(2) 42% of children improving significantly from their autism to function successfully in less restrictive educational and community environments than severe and profound self-contained classrooms;

(3) some of the remainder of the children acquiring at least those adaptive behavioral gains to allow them to function successfully in more restrictive and home environments without suffering repeated risk of expulsion on behavioral grounds.

Plaintiffs also allege that shortly after or about the same time as the 1987-1993 research performed by Lovaas was being published and reviewed, a British study was published and reviewed in the autism press. Plaintiffs allege that this study described a checklist (the "CHAT") for the detection of autism at eighteen months of age. Plaintiffs allege that a nurse, physician, or educational evaluator can conduct the CHAT in only a few minutes. Plaintiffs allege that a later study validated the CHAT as an instrument which successfully identified twelve eighteen-month-old children as being at risk for autism, out of a total regional population of 16,000 eighteen-month-olds surveyed.

Plaintiffs Michael Asbury and Kathryn Asbury claim that since January of 1993, they have, at their own expense, secured several independent diagnostic and educational evaluations of Daniel, because the Maplewood-Richmond Heights School District and the Special School District failed to identify and evaluate Daniel's disability and educational needs in an appropriate and timely manner.

Plaintiffs Michael Asbury and Kathryn Asbury also claim that in May, 1996, they secured at their own expense, several 1:1 aides and consultation services from the Center for Autism and Related Disorders of Encino, California, to instruct Daniel by the Lovaas methodology at home and integrate him into private preschool settings in the community. Michael Asbury and Kathryn Asbury allege that when it became clear that the Lovaas methodology was helping Daniel, they requested that the Maplewood-Richmond Heights School District and the Special School District adopt and fund the program as well as write the program into Daniel's individualized educational plan ("IEP"). The plaintiffs allege that the two school districts refused their request and also refused to explain in writing the basis for the refusal. The defendant in this action, the Missouri Department of Elementary and Secondary Education ("DESE" or "defendant") is the State Educational Agency ("SEA") for Missouri under the IDEA, meaning it has supervisory authority under the IDEA over these entities.

B. GENERAL BACKGROUND INFORMATION IN REGARDS TO LOVAAS.

In 1986, Dr. Lovaas published an article entitled *Behavioral Treatment and Normal Educational and*

Intellectual Functioning in Young Autistic Children in the *Journal of Consulting and Clinical Psychology*, 1987, Vo. 55, No. 1. The article concerned results of a study involving the Lovaas methodology, an intervention that breaks down behavior into small, measurable units and involves teaching each unit of behavior to children systematically. Dr. Lovaas' study, which was funded by the National Institute of Mental Health and conducted at the University of California at Los Angeles, compared nineteen children, on average, between the ages of three and four, who were receiving forty hours per week of one to-one behavioral instruction (the Lovaas methodology) for at least two years, to a group of children receiving less than ten hours per week of such instruction, and to another group of children receiving no intensive behavioral instruction (but receiving Special Education, speech therapy, occupational therapy ("OT"), and the like). The study indicated that the children receiving forty hours a week of Lovaas instruction showed substantial gains in intellectual functioning when they were evaluated at the ages of 6 or 7, with an average gain of thirty points in IQ. Prior to the Lovaas instruction, there were no significant differences in IQ or mental ages among the three groups. According to the study, children receiving fewer or no hours of Lovaas instruction (receiving only Special Education and therapies) showed virtually no gain in average IQ and mental ages, and actually showed loss of IQ. Most encouragingly, 47% of the children receiving forty hours per week of Lovaas instruction (9 of the 19 children) had above-average IQ scores and were fully mainstreamed (for academic and non-academic activities, without paraprofessional aides) into regular preschool and first grade, at which point the hours of Lovaas 1:1 instruction were reduced considerably. An-

other 42% of the children receiving forty hours of Lovaas instruction (8 of 19 children) showed substantial improvement, were in the mildly retarded range of functioning at follow-up and were placed in language-delayed special education classes while only 2 of the 19 children remained placed in classrooms for the profoundly retarded.

In contrast, of the forty children in the two control groups receiving no Lovaas instruction, or less than ten hours a week of Lovaas instruction, only one achieved full mainstream placement in a regular first grade class and had an IQ within the normal range; 45% (18 of 40) were classified as language-delayed; and 53% (21 of 40) remained classified as profoundly retarded.

In 1993, a follow-up study, again financed by the National Institute of Mental Health, was published entitled *Long-Term Outcome for Children with Autism Who Received Early Intensive Behavioral Treatment* by John J. McEachin, Tristram Smith and O. Ivar Lovaas. In this study, all of the nineteen children who received more than forty hours per week of Lovaas instruction as reported in the 1987 study were re-evaluated when they were, on average, thirteen years old. Evaluators and testers were "blind" to whether a particular child assigned to them had received intensive Lovaas instruction, or was a child with no previous history of autism. The gains found earlier in 1987 were still evident years later in the children who had received intensive Lovaas instruction: eight of the nine children who had earlier achieved full mainstreaming were still in regular education, and one had fallen back to special education; another child who had received forty hours per week of Lovaas instruction and had originally been placed in special education for first grade had moved up into

regular education and was attending junior college. Likewise, IQ gains found in the 1987 study were maintained years after Lovaas instruction had been discontinued, as were gains in adaptive behavior. Both IQ and adaptive behavior gains were greater than those of the control group children. All but one of the children in the second control groups remained in special education at follow-up.

One of the defendant's experts, B.J. Freeman, served on the dissertation committee of author John McEachin, reviewed the plan for this research and the results of this research, and approved this "nice study" resulting in the published article based upon McEachin's dissertation at UCLA. Freeman continues to do research with McEachin on intensive in-home autism programs with the workshop model. Freeman believes referral of children to Lovaas' UCLA clinic is appropriate, in her view, when the child has been "in a school program where he was not learning very rapidly," so that "in the more intensive one-on-one, his rate of learning has accelerated."

When the 1993 study was published, it was accompanied by the commentaries of five of Lovaas' peers. Most of the commentaries, which plaintiffs have supplied to the Court, praise the study by stating "this is a triumph of behavioral science . . .," that "Lovaas and his co-researchers have broken down barriers," and that Lovaas and his co-workers have "literally created the field of behavioral treatment of individuals with autism." The other commentaries warned about "jumping to the conclusion that the children have been cured" and arguing that while the results are impressive, they "fall short of demonstrating normal functioning." Plaintiffs note that numerous additional studies and publications have

partially replicated the Lovaas study and findings. Plaintiffs supplied such studies to the Special School District for consideration with respect to Daniel's education.

The parties agree that in 1995, and even today, the Lovaas methodology was, and is, not accepted in the educational community as the only sound method of educating autistic children. Plaintiffs merely claim that the program is promising and has received positive statements from the Governor of the State of Missouri. *See infra.* for further information with respect to the Governor's comments. However, the parties disagree with respect to the issue of whether professionals who advocate the Lovaas methodology are, in fact, using a variety of teaching techniques, which would mean there is not a uniform method of "ABA/DTT/Lovaas."[2] Plaintiffs claim that there is a "fair consensus" as to the proper method among experts and others, or, at least enough of a consensus within defendant's staff and the Department of Mental Health's staff sufficient for the method to have been the subject of autism task force groups from June, 1998 to June, 1999.

In addition, the parties agree that there is disagreement among some professionals in the field of autism regarding the efficacy of Dr. Baron-Cohen's research results and the CHAT test, which is used for the identification of young children with autism; however, plaintiffs claim that the CHAT test, as well as the research supporting and describing it, is widely available, and that in New York, it has met with positive evaluations.

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[2] "ABA" and "DTT" stand for Applied Behavior Analysis using Discrete Trial Training. These terms are used to describe the methodology developed by Lovaas.

C. THE MISSOURI STATE PLAN UNDER THE IDEA.

Before analyzing defendant's treatment of children with autism, especially with respect to the Lovaas methodology, the Court must understand the procedures, policies, and plans in place in the state of Missouri. John Heskett, who testified in this matter with respect to Missouri's State Plan and Missouri's education systems with respect to children with autism, was the Assistant Commissioner of Education for Special Education for defendant from 1995 until June 30, 1999.[3] As of June, 1999, there were approximately 131,571 students in Missouri receiving special education services under the IDEA in 524 school districts.

Under the IDEA, each participating state, like Missouri, must file a State Plan setting forth, among other things, its implementing procedures for ensuring that students receive a free and appropriate public education ("FAPE"). The State Plan is a comprehensive statement of the statutes and regulations that pertain to the provision of special education services to students with disabilities. The Missouri State Plan is a part of the Missouri Code of State Regulations. The State Plan must be approved by the United States Secretary of Education before a state receives any federal funding. At all times since 1993, the Secretary of Education has approved Missouri's State Plan, which was drafted by defendant's staff.

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[3] On July 1, 1999, Heskett left his employment with defendant, and he was replaced by Stephen Barr in September, 1999. Plaintiffs claim that Barr seems opposed to increasing autism-specific training and capacity as a philosophical matter.

The State Plan in effect from 1995-1998 did not, on its face, reflect any changes arising from Congress' Reauthorization of the IDEA in 1997; however, defendant and the federal reviewing authority construed the Plan to include those changes, so defendant has filed assurances that comply with the 1997 Reauthorization.

1. THE ROLE OF THE LOCAL AGENCY IN IMPLEMENTING THE PLAN.

The Missouri State Plan makes clear that defendant requires the Local Educational Agencies ("LEAs"), or local school districts, to implement the requirements of the IDEA. The State Plan requires each LEA to submit a comprehensive Compliance Plan to defendant. In addition, defendant has a monitoring system, including off-site reviews of data and periodic on-site reviews of data and programs, to determine whether each LEA is in compliance with its requirements. However, plaintiffs claim that defendant does not have monitoring standards in place in regards to early intervention for young children with autism, and that defendant monitors only for minimal compliance with IDEA and state special education regulations and statutes.

In accordance with its understanding of the requirements under the IDEA, defendant has had written program review standards in place since at least 1992. These program review standards help defendant determine whether an LEA is doing what it assured defendant that it would do in its Compliance Plan. The monitoring system requires that school districts participate in a comprehensive monitoring procedure at least every five (5) years. As part of defendant's monitoring system, defendant's staff reviews representative samples of student school records to determine if the LEA con-

ducted evaluations, program planning, and parent contacts consistent with the requirements of federal and state law and regulations. This review includes analysis of screening records, evaluation reports, diagnostic summaries, the IEP developed for a child, and notices provided by the parents of that child to the school. Defendant also makes on-site visits to the LEAs as part of the review process. Before making this visit, defendant's staff conducts a review of documentation maintained in the defendant's office. This documentation would include analysis of any administrative hearing decisions involving special education disputes between parents and the LEA, and any complaints filed by parents alleging that the LEA violated the IDEA. Defendant's staff also reviews financial and staffing records to determine whether there are any issues or concerns which defendant should further investigate.

After defendant completes its review, it sends a report of its findings to the LEA. Defendant identifies any areas in which the LEA has failed to comply with the requirements for the education of children with disabilities. Defendant follows up to ensure that the LEA makes any necessary changes. In its monitoring of the Special School District of St. Louis County for the period from 1995 until the current date, defendant did not identify any failures of compliance by the Special School District on issues specific to autism.

2. EDUCATIONAL DEFINITION OF AUTISM IN THE MISSOURI STATE PLAN.

As early as the 1984-1986 Missouri State Plan for compliance with the Education with the Handicapped Act, 20 U.S.C. § 1410, the Missouri State Plan included

a disability category and definition of autism. Defendant did not believe that federal law mandated Missouri's inclusion of autism as an education disability category. Most other states did not yet recognize autism as an educational disability until the IDEA required it in 1990.

Presently, autism is defined in the Missouri State Plan. Specifically, the Plan states as follows:

> Evaluation of students with autism for educational programming generates unique issues. These issues include the need for assessment of functionality. This is made necessary by the inherent difficulties in skills generalization that most autistic persons exhibit. In data gathering, particular attention should be paid to developmental history, including a family interview and complete medical information; direct behavioral observations conducted on different days in multiple environments including, but not limited to school settings; and written, dated anecdotal records of a behavioral nature.
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> NOTE: Any identification such as autism does not dictate a specific placement. Since Missouri does not have teacher certification for autism, it is important in considering an educational placement for students with autism to base such decisions on the assessed strengths and needs of the student, rather than on stereotypical reactions to the label of autism. Any certified teacher(s) qualified to provide the services delineated in the IEP [*Individualized Education Program, see Plan, p. 24*] may do so. Students with autism may be served in a variety of

> educational settings. It is critical to have access to staff who have competence in working with students with autism and who will respond to the unique learning characteristics of these students.

Sometimes during this litigation, the parties make reference to "ECSE." This refers to "Early Childhood Special Education," and this term is described in the Missouri State Plan as follows:

> Early childhood special education eligibility criteria are used for initial eligibility determination for students who are identified as disabled and are between the age of two and six. Public agencies are required to provide special education and related services for eligible students on the third birth date of the eligible student.
>
> Eligibility for early childhood special education is based upon significant delays in development that effect the student's educational performance. The eligibility determination is noncategorical; identification by distinct disability categories is not required.
>
> Students who attain the age of five during a school year may be determined eligible for special education services based upon either the early childhood special education criteria or one of the distinct disability conditions as defined by IDEA.

The State Plan clarifies the responsibilities of defendant and the LEAs under the IDEA for identifying the particular disability of young children. Specifically, the State Plan provides as follows:

Students who are determined eligible for special education in Missouri are entitled to receive these services on their third birth date. If the initial eligibility for special education services is determined while students are two, three, or four years of age and will not turn five during the school year, local districts use the noncategorical early child special education (ECSE) eligibility criteria.

If a student's fifth birth date occurs during a school year and initial eligibility is being determined then districts may use either the ECSE or a categorical criteria.

* *

All students must have a categorical definition in place by the beginning of their first grade school year (those students turning six by July 1). ECSE service delivery models are not placement options for students who attain the age of six by July 1. The parties dispute whether the LEAs use the ECSE eligibility criteria for children less than five years old. Defendant claims that the LEAs use such criteria as set forth in the Plan, while plaintiffs deny that the LEAs use such criteria. In this regard, plaintiffs note that the State Plan requires that for such children with "visual and/or auditory impairment . . . the impairment must be noted in the diagnostic summary." Defendant notes that the State Plan contains no similar directions with respect to young children with autism. However, all parties agree that if the child is five years old, then the LEA may use either the ECSE or the more specific categorical criteria (such as the definition of autism).

The parties also agree that by the time a child is six years old, the LEA must identify the child using a categorical educational definition, not the ECSE description. However, plaintiffs claim that the age of the child when such identification occurs under the Plan is important, because plaintiffs claim that by the time a child reaches the age of six, the window of opportunity for appropriate response to the ABA/DTT/Lovaas intervention has started to close. Thus, plaintiffs' argue, it is inappropriate under the IDEA to delay such intervention until such time, because such delay, due to Missouri's procedures, places young children with autism at an unacceptable risk of inappropriate services in the crucial early childhood years. Plaintiffs note that the actual Missouri state child counts of children over the age of five who are given the "educational autism" label have climbed rapidly from 356 in 1992 to 934 in 1997.

In addition, plaintiffs agree with defendant that notwithstanding the LEAs' identification of a child for educational purposes under the noncategorical ECSE definitions when the child is five years or younger, or the more specific categorical criteria by the time the child is six years old, the LEAs are required to provide services according to the specific needs of the child, not the label applied to the child. Plaintiffs also agree that if a child between the ages of three and twenty-one has been identified by medical professionals as a child with autism or a child who may have autistic symptoms, then the LEAs are required to review the medical diagnostic information and conduct additional educational assessments as may be necessary to determine if the child is in need of special education services;[4] however, plaintiffs

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[4] If the child is in need of such services, then the LEA develops an IEP to address the child's specific needs.

argue that implementation of the IDEA in Missouri with respect to young children with autism makes this task extremely difficult for LEA IEP teams to accomplish in the absence of appropriate guidelines, the absence of sufficient capacity for ABA training, the absence of appropriate on-site, child-specific autism teacher training, the absence of certification of behavior analysts, and other systemic shortcomings.

For children under the age of three, the Individualized Family Services Plan developed for a child with a disability by the Missouri Department of Mental Health and Department of Health staff pursuant to the interagency agreement with DESE is driven by the specific needs of the child, and is not limited by the educational identification of the child. In addition, if a child under the age of three has been identified by medical professionals as a child with autism or a child who may have autism symptoms, then the Department of Mental Health and Department of Health staff must review the diagnostic information and conduct such additional assessments as may be necessary. If such a child is in need of early intervention services, then the Missouri Department of Mental Health and Department of Health staff members develop an Individual Family Services Plan to meet the child's specific needs.

While plaintiffs agree with all these facts in regards to children under the age of three, plaintiffs claim that before October 29, 1998, implementation of the IDEA with respect to young children with autism from age birth to three in Missouri made the tasks difficult in the absence of appropriate guidelines, the absence of sufficient capacity for ABA training, the absence of appropriate on-site, child-specific autism teacher training, the absence of certification of behavior analysts, and other systemic shortcomings.

3. DEFENDANT'S INVOLVEMENT WITH CHILDREN UNDER THE AGE OF THREE AS SET FORTH IN THE PLAN AND THE PROVISION OF INFORMATION TO THE PUBLIC AND CHILDREN WITH DISABILITIES.

Through an executive order, the Governor of Missouri named defendant the lead agency for providing educational services to children from birth to three years of age. These services are detailed in an Individualized Family Services Plan for those infants and toddlers with disabilities who are between the ages of zero and three and their families. Defendant provides these services through an interagency agreement with the Missouri Department of Mental Health and the Missouri Department of Health. Defendant works with other Missouri state agencies, including the Missouri Department of Mental Health, to identify and evaluate children with disabilities, including not only children over the age of three, but also infants and toddlers.

Defendant coordinates the dissemination of information about children with disabilities obtained from other state agencies to the LEAs, who are actually responsible for serving those children with disabilities who are three to twenty-one years of age. In addition, defendant requires that LEAs meet minimum standards for identifying children with disabilities and informing the public of the child's entitlement to FAPE. Defendant requires that LEAs issue public awareness information that specifies the responsibility to serve all categorical disabilities in the following ways: (1) by providing public notice to newspapers and radio or television; (2) by placing posters in all district administrative offices; and

(3) by distributing written literature to the parents or guardians of students enrolled in the local school district.

In addition, defendant has an interagency agreement with the Missouri Department of Mental Health and the Missouri Department of Health under which those agencies must notify the public about the full educational opportunity timetable for preschool students and must provide information/referral to the First Steps Program - - Missouri's implementation of Part C of the IDEA for infants and toddlers ages zero to three years. Defendant requires each LEA to certify that it has complied with these standards on an annual basis. While plaintiffs agree that defendant had such an interagency agreement in place, plaintiffs claim that until October 29, 1998, there were no First Steps/Autism guidelines available and in effect in Missouri to emphasize the importance of early autism diagnosis, to describe appropriate intervention practices, and to provide models of services delivery and authorize the commitment of sufficient financial resources.

In addition to the foregoing, defendant also requires LEAs to conduct an annual census of all children with disabilities that reside within the district and to publish a notice to the public that they are going to conduct such a census. Defendant also requires each LEA to design and implement a comprehensive, continuous and periodic screening program designed to identify children with suspected disabilities. Defendant monitors the LEAs to ensure that these requirements are implemented. In addition, defendant understands that the LEAs must also offer developmental screening to children from birth to age five to comply with Missouri state law. Plaintiffs agree that defendant places these re-

quirements upon LEAs, but states that the annual census does not require the reporting of the number of children with autism under age five.

Defendant also plays an important role with respect to the Parents as Teachers program. Parents as Teachers is a state-mandated program that provides developmental screening and parental education for children from birth through the age of five. Throughout the state of Missouri, defendant funds the Parents as Teachers program, and the LEAs operate the program. Defendant encourages the LEAs to display notices describing the Parents as Teachers program in all hospitals. In addition, LEAs provide Parents as Teachers information in new parent packages provided to birthing nurseries in hospitals throughout Missouri.

The Parents as Teachers National Center, which is located in St. Louis, Missouri, trains all Parents as Teachers educators to conduct screening in the following developmental areas: (1) hearing; (2) vision; (3) motor skills; and (4) language/concepts. Training with respect to the program includes how to make referrals to the First Steps Program, and how to make referrals to the LEA for provision of free and appropriate educational services. If a Missouri parent thinks that a child aged birth to five might have a disability, than the parent may go to the LEA.

The LEAs' Parent as Teacher parent educators should perform a screening of children, and based on the results of the screening, should provide parents information about the First Steps Program if the children are under three years old. If the child is older than two, then the Parent as Teacher parent educator can refer the parents to the LEA itself for the provision of free and

appropriate educational services. In addition, the Parent as Teacher parent educator may also make an appropriate referral to the child's primary care physician for further evaluation and treatment. For children older than five, who do not fall within the Parents as Teachers program, there are other referral methods within each LEA. The LEAs also have programs for continuous monitoring of children with disabilities.

Defendant collects data from the Parents as Teachers final reports to determine the number of children found to have possible developmental delays. During 1992 through 1998, 22,436 children in Missouri ages birth to three were found to have possible developmental delays in language or conceptual development according to data compiled about Parents as Teachers screenings. During 1992 through 1998, 93,025 children in Missouri in these same age groups were found to have possible delays in language or conceptual development according to data compiled about Parents as Teachers screenings.

Plaintiffs admit that all of what defendant states in regards to Parents as Teachers is true; however, plaintiffs claim in the case of Daniel, the program failed to identify his autistic condition. In addition, plaintiffs note that in this case, no Parent as Teacher educator ever referred Daniel to his primary care physician for further evaluation and treatment. Plaintiffs claim that all referrals to Daniel's primary care physician were made by his family. In addition, plaintiffs state that the Parent as Teacher educator was not in direct communication with Daniel's primary care physician. Furthermore, plaintiffs note that the statistical information compiled by defendant does not disclose the number of young children with autism, or suspected of having autism, in Missouri.

To counter defendant's evidence in regards to the dissemination of information in regards to Lovaas, plaintiffs plan to present the testimony of expert witness Dr. Patricia M. Meinhold, an allegedly exceptionally qualified expert in regards to autism.[5] Plaintiffs anticipate that she would testify about the appropriateness, or inappropriateness, of child find, dissemination and implementation of promising research and autism teacher training offered by defendant and defendant's Project ACCESS[6] during the time of Daniel Asbury's eligibility for a free, appropriate public education.

The First Steps personnel are employees of the Missouri Department of Mental Health and the Missouri Department of Health. While plaintiffs dispute whether or not defendant has followed its own policy as set forth in the State Plan, they admit that the State Plan states that it is defendant's policy to develop, implement, and maintain a Comprehensive System of Personnel Development that meets the requirements of the IDEA and is consistent with the Early Childhood Education Act. Since 1989, there has been continued broad based training to address administration, coordination, and programming issues involving the design and delivery of early intervention services to children with disabilities through the Missouri First Steps Program. In addition, defendant provides in-service training to First Steps personnel and also funds their attendance at educational and training conferences.

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[5] The Court has included more specific information with respect to Dr. Meinhold's anticipated testimony *infra*.

[6] The Court has included a detailed description in regards to the goals, purposes, and general structure of Project ACCESS *infra*.

While plaintiffs do not dispute that defendant has taken these actions, plaintiffs do dispute that the training has fulfilled defendant's obligations in regards to children with autism. Defendant notes that until October 29, 1998, Missouri did not have First Steps/Autism ABA Guidelines available and in effect to emphasize the importance of early autism diagnosis, to describe appropriate intervention practices, and to provide models of services delivery and authorization of the commitment of sufficient financial resources. In addition, plaintiffs argue that to the extent that First Steps personnel attend Project ACCESS autism training conferences, such training is inappropriate.

4. DEFENDANT'S PROCEDURES AND POLICIES WITH RESPECT TO TEACHERS AND ADOPTION OF "PROMISING PRACTICES."

The parties agree that Missouri does not require that children with autism only be taught by specialized teachers with certification to teach children with autism, and that other states, like Missouri, have moved to adopt cross categorical certification of teachers. The cross categorical certification of teachers is predicated on the assumption that while diagnoses may differentiate disabilities, the services provided and teaching methods employed for many disabilities are very similar. Cross categorical certification of teachers focuses on training teachers in methodologies to support the learning needs of children with disabilities in the general education classroom and other settings as may be appropriate. While plaintiffs agree with all these statements in regards to cross categorical certification, plaintiffs argue that the assumption that the services provided and teaching methods employed for many dis-

abilities are very similar is erroneous in the case of young children with autism. Plaintiffs also deny that defendant's teacher training is effective for young children with autism.

In addition to the foregoing, defendant requires that LEAs ensure trained personnel administer tests to children with suspected disabilities, and that LEAs ensure evaluations of children with disabilities are made with a group consisting of at least one specialist with knowledge of the suspected disability. Plaintiffs admit only that defendant is *supposed* to require such testing and evaluations. If a child is then identified as a child with the disability of autism, then the LEA is required to ensure evaluations are made with a group consisting of at least one specialist with knowledge of the suspected disability.

Plaintiffs claim that defendant's policies and procedures for adoption of promising practices are deficient. Plaintiffs claim that a Newsletter describes defendant's Effective Practices Model Programs Project, which is by "nomination." Plaintiffs note that a "program" is defined as a system of operating procedures in an LEA which conforms to all compliance requirements in the areas of screening and evaluation, IEP development and/or service delivery. A "practice" is defined as "a successful or effective activity, method or technique which improves the quality of education for students with disabilities." In order to be nominated, a "program" or "practice" must first be in place one year, meet a need with effective/positive results, be capable of replication, and be outstanding, exemplary and cost-effective.

Plaintiffs also note that at the first autism teacher training workshop in 1985, it was asserted that one-

half of all autistic children remain non-verbal, another one-half have disordered language (strange or disturbed) and half never learn to speak. Plaintiffs claim that it was also stated that the individuals at the workshop heard a presentation featuring the concept that students with autism engage in ungodly crazy behavior - - poor learning or processing of knowledge of what is required in his or her environment.

D. DEFENDANT'S DISSEMINATION OF INFORMATION IN RELATION TO EDUCATION AND AUTISM: Project ACCESS.

In this case, plaintiffs claim that defendant has failed to properly disseminate information related to promising practices for children with autism as set forth by Dr. Lovaas and others. Plaintiffs do not dispute that defendant funds several resource services, including the Center for Innovations in Special Education ("CISE"). Plaintiffs also do not dispute that the materials distributed by CISE include the *Innovations* newsletter, which is disseminated to every special educator and director four times a year, and provides regular updates regarding the activities of the resource projects.

In addition, plaintiffs do not dispute that defendant funds Project ACCESS, which is described in the State Plan as "a cooperative effort with Southwest Missouri State University in Springfield, Missouri, to work with school districts to improve the quality of educational services for students with autism." In addition, it states that Project ACCESS "staff conduct training and provide on-site technical assistance, including assistance in developing strategies for including students with autism in regular education settings." In addition, plain-

tiffs do not dispute that the Missouri State Plan provides that these special resources (ACCESS and CISE) "are charged with acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research that relate to their specific topical areas."

Defendant has provided background facts in regards to Project Access. First, defendant states that in the Spring of 1985, its supervisors met with parents of children with autism in the Springfield, Missouri area to learn more about the needs of this population. Following this spring, 1985 meeting, defendant planned and funded a week long training program in August, 1985. With a target group of eighteen children with autism in southwest Missouri, defendant provided a grant from its discretionary funds pursuant to the Education with the Handicapped Act to Dr. B. Vaughn George to establish a regional technical assistant project. The Area Children's Center for Evaluation and Support Services ("A.C.C.E.S.S."), as it was called, was housed at the Exceptional Pupil Cooperative of the Ozarks in Bolivar, Missouri, where Dr. George was the director. Dr. George hired Susan Hawkins-oest in autumn, 1985 to provide direct assistance to schools serving children with autism. At that time, no other Midwestern state educational agency maintained a specifically funded project focused on the training of teachers expressly for the educational needs of children with autism.

In the late 1980s, this autism project was relocated to the Southwest Missouri State University campus, where it changed its title to Project ACCESS and, through increased funding from defendant, expanded to include teachers throughout the state of Missouri. Presently, defendant enters into an annual contract with South-

west Missouri State University for operation of Project ACCESS.

Each year, Project ACCESS files a detailed report with defendant describing its budget, its goals, and its plan for, achieving these goals. As part of its responsibilities to defendant, Project Access locates and trains Missouri Autism Consultants ("MAC") around the state who provide periodic child specific consultation to school districts. Project ACCESS also trains In-District Autism Consultants ("IDACS") at the request of school districts. Neither the MACs nor the IDACs are employed by defendant. Both MACs and IDACs provide services only within their local school districts.

In addition, Project ACCESS maintains a library. A list of resources available through loan through Project ACCESS is spiral bound and available to the public. Project ACCESS also puts out the *Express* newsletter, discussing items of particular interest. The ACCESS *Express* newsletters are provided free of charge to each local educational agency within Missouri, and to other educators and to parents of children with autism, or other interested persons who request placement on the Project ACCESS mailing list. The November, 1995 issue of the *Express* advises readers of the acquisition by the library of *Behavioral Treatment of Autistic Children* by Lovaas. The August, 1996 issue of the *Express* includes a discussion by Julie Donnelly, Senior Resource Specialist, of "The Pros and Cons of Discrete Trial Training: is the 'Lovaas' behavior modification appropriate for my student?"

The May, 1997 issue of the *Express* includes a response by Donnelly to a reader's question regarding what is a "certified applied behavior analyst" and where to obtain

certification in applied behavior analysis. The August, 1997 issue of the *Express* advises readers of the acquisition of *The ME Book Videotapes* by Lovaas. The May, 1998 issue of the *Express* advises readers of the acquisition of *Applied Behavior Analysis for Teachers, 4th Edition*, by Alberto & Troutman, describing it as "a very thorough review of applied behavioral analysis."

Defendant has also presented evidence in the form of copies of Midwest Autism newsletters distributed by Project ACCESS to educators and parents of children with autism in Missouri. The September, 1995 Midwest Autism newsletter includes an article by Gerry Gritzmacher of the Iowa Bureau of Special Education entitled *A Discussion of the Lovaas Behavioral Modification Program for Students with Autism.*

E. DEFENDANT'S INTERAGENCY AGREEMENT WITH THE DEPARTMENT OF MENTAL HEALTH.

Plaintiffs claim that in late 1996, defendant and the Department of Mental Health signed an Autism Interagency Agreement which describes the Department of Mental Health's Autism Projects, defendant's Project ACCESS, LEA and SEA responsibilities under the IDEA and other schemes. The parties agree that the framework in the agreement provides for mutual sharing of information and other resources. Also, the agreement provides a mechanism for resolution of child specific issues which may arise in the provision of family based services from the Missouri Department of Mental Health and educational services from local school districts.

Notwithstanding these facts, plaintiffs claim that actual implementation of the framework has been lacking. Specifically, the parties dispute whether such agree-

ment provided a framework within which comprehensive services from the Department of Mental health and local school districts are coordinated. Defendant claims that the agreement did provide such a framework, while plaintiffs claim that from 1995 to the present, there is a continuing lack of coordination, lack of consensus, and lack of joint action between defendant, the Department of Mental Health and local school districts, particularly in regards to Lovaas intervention for young children.

Plaintiffs claim that at least two sets of autism task force committees have reached only an impasse on the issue, and failed, to date, to increase statewide capacity to train in Lovaas intervention methods. Plaintiffs claim that on April 23, 1998, a defendant/Department of Health Interagency Sub-Committee on Early Intervention Guidelines met. Plaintiffs claim that Irene Orlando of SSD, an administrator who responded negatively to their request for Lovaas, attended as a representative of defendant. In addition, plaintiffs claim that after "philosophical groundwork," including two works in regards to parents dealing with autistic children and a video, they were instructed with respect to the differences between "programs" and "methods," and told that ABA methodology is not "owned" by Lovaas, and that Missouri discouraged the use of punishments such as seclusionary and exclusionary time-out, contingent exercise, restitution, and verbal reprimands.

The subcommittee also discussed "potential collaborations" of defendant and the Department of Health to fund intensive in-home therapies like Lovaas temporarily for five to six years until schools and communities could be trained and alternative resources identified for children ages zero to eight. The subcommittee was unable to reach a consensus, however, on any point.

Plaintiffs claim that some members of the committee were adamant in regards to Lovaas type training being included in the guidelines while representatives for defendant indicated that importing an entire program under the IDEA would be illegal, because of its focus on individualized treatment. It was also noted that effective practices encourage the use of multiple ("eclectic") methodologies when implementing individual IEP programs. Plaintiffs allege that it was also reported that the subcommittee would be unable to develop guidelines until the larger issue of intensive forty hour per week interventions could be addressed and resolved by the larger committee — and that there was no point in scheduling another committee meeting at that time.

Plaintiffs further claim that on October 29, 1998, the Department of Mental Health issued an Official Memorandum covering the First Steps/Autism (ABA) Guidelines, effective November 1, 1998, to assure that a process is in place to effectively serve children eligible for First Steps services who are receiving ABA. Plaintiffs claim that this Memorandum is very proactive concerning Lovaas methodology, with a good description of the service, an emphasis on intensity, a provision for diagnosis at eighteen months, recognition of the importance of data, a provision for frequent adjustments and review every three months, a provision for consultant services available on January 1, 1999, a provision for qualified consultants, emphasis on the importance of training staff, and provision for supervision by appropriate professionals, as much as forty hours per week, and information with respect to how to coordinate and pay for services up to $2,600.00 per month. Plaintiffs claim that these Guidelines came from some joint endeavor between defendant and the

Department of Mental Health. However, plaintiffs argue that by incorporating Project ACCESS and continuing to "outsource" autism teacher training to the four and five individuals at Project ACCESS, defendant has insured the frustration of parents seeking to have public schools, MEDICAID, and EPSDT cooperate to provide services appropriate.

F. PLAINTIFFS' EVIDENCE AND CRITICISMS IN RESPONSE TO DEFENDANT'S EVIDENCE OF ITS ACTION WITH RESPECT TO CHILDREN WITH AUTISM AND THE LOVAAS METHODOLOGY.

Notwithstanding defendant's evidence with respect to its actions undertaken for the purpose of educating children with autism, and any efforts with respect to Lovaas in particular, plaintiffs claim that defendant failed in these efforts under the relevant statutory provisions for several reasons. In general, plaintiffs claim that information in regards to Lovaas early intervention for young children with autism is "weak," and that Project Access and defendant prefer to support "eclectic programs." Plaintiffs note that Heskett wrote repeatedly that Lovaas techniques were not appropriate unless a child is failing to respond to more traditional methods and less intensive levels of service. In addition, plaintiffs claim that Paula Goff specifically disagrees with ACCESS and Heskett's views in this regard, and with the urging in the SHOW ME HOW Technical Assistance Bulletins that the appropriateness of Lovaas intensive early intervention should be a data-driven decision.

Plaintiffs take issue with many, it not all, of the actions and publications from Project ACCESS. First, plaintiffs claim that on November 1, 1991, Project ACCESS presented a Workshop entitled "Introduction to Autism," as an inservice to Heard Start staff in Missouri. Plaintiffs claim that the Workshop presented the educators with the following facts that are contrary to the Lovaas "promising research:" (1) that autism is "a life-long disability" that is not curable; (2) that about 85% of autistic children are also retarded, that approximately 50% are functionally nonverbal, and that even if the person can speak, the speech is not used in a meaningful way. Plaintiffs claim that the Workshop limits the goals of, educators in regards to autistic children, because it made them strive to assure that such children became only employable or able to live independently and prepared them to see young children with autism as candidates for lifetime special education. Plaintiffs claim that such training was consistent with the materials included from the Indiana Resource Center for Autism. Plaintiffs claim the 1991 Workshop did not include any Lovaas information.

Plaintiffs claim that on February 12, 1992 and on March 24, 1992, defendant and Project ACCESS presented a Workshop entitled "Communication Programming for Students with Autism." Plaintiffs claim that such Workshop did not include reference to Lovaas, but instead, Project ACCESS disseminated a bibliography on communications boards.

Plaintiffs claim that on March 3, 1992, Project ACCESS presented a workshop entitled "The High Functioning Autistic Students in the Schools" for students with autism "having a Full Scale IQ score above 70, able to speak with some degree of intent, and able to under-

stand what is said reasonably well." Plaintiffs claim this presentation has relevance to Daniel, because his Leiter IQ (nonverbal) was measured at 108 when he was a young child. Plaintiffs claim this workshop provided information about the "realistic" assessment of high-functioning students with autism for vocational rather than academic education, and provided sample IEP goals and objectives for a ten year old student with autism, such, as meal preparation, sorting and folding of laundry, leisure activities such as swimming or bowling, computer games with a peer, learning street signs and how to cross the street, how to use the restroom and ride the bus, how to identify twenty functional sight words from phone books and menus, how to make purchases, staple, collate, fold, and punch paper. Plaintiffs claim that no suggestions were made for how to develop spoken language or other normal level of functioning in young children with autism.

Plaintiffs note that in July, 1992, defendant and Project ACCESS issued Fact Sheet 4: "About Autism and Young Children." Plaintiffs claim that the Fact Sheet repeated the assertion that autism is a lifelong, incurable disability, with 85% of such children retarded and 50% functionally nonverbal.

On February 1, 1993, Heskett attended a meeting of the Northwest Missouri Autism Consortium at which Lovaas was discussed. The notes of the meeting were signed by Peter Griggs, Director, Department of Mental Health's Northwest Missouri Autism Consortium. Heskett asked that the individuals involved consider "mega services packages," which he described as in-home early intervention services (i.e. Lovaas) that defendant was "clearly unable to maintain when transitioning a child into a comparable level of educa-

tional services" (i.e. from First Steps 0-3 to early childhood 3 and above). The notes also indicate that Heskett understood that most families were receiving thirty to forty hours per week of intensive in-home early intervention services.

On March 12, 1995, parents Richard and Katrina White wrote a letter to Heskett concerning many of the issues in this present lawsuit. The whites asked Heskett how defendant had complied for the previous five years, with respect to autism, with the requirement that each school district adopt effective procedures for acquiring and disseminating significant information from educational research, demonstrations, and similar projects, and for adopting, where appropriate, promising educational practices developed through such projects. The Whites asked how defendant had tried to comply with specific issues of credentials of evaluators and credentials of teachers who teach children with autism. The Whites also *Expressed* concern with issues involving placement of children with autism in "generic" classes with students with mental illness, mental retardation, behavior disorders or communicative disorders. They also referred to the fact that the Missouri State Plan for early childhood special education was noncategorical (i.e. did not require identification of "distinct disability categories") and asked whether the SEA was aware that some LEAs interpret such statement to mean that autistic children between the ages of three and six were not to be specifically labeled with the definition of autism and, therefore, were not allowed an individualized FAPE.

The Whites also asked whether the SEA agreed that at age three, according to the IDEA, autism was a separate eligibility category, whether the SEA believed

that at this early age there was no real difference between an individual with autism and an individual with other disabilities, whether the SEA denied that autistic individuals, even at an early age, might need a different education, methodology, or curriculum design in order to get a FAPE. The Whites also noted that the Missouri State Plan did not have teacher certification for autism. They also asked many questions in regards to who might have expertise within the state in regards to autism and the statement that it "is critical to have access to staff who have competence in working with students with autism and who respond to the unique learning characteristics of these students." The Whites also asked about contractual relationships of SEAs in regards to autism. Finally, they asked how the SEA was meeting the obligation under the Rehabilitation Act that requires that "the quality of the education services provided to handicapped students must equal that of the services provided to nonhandicapped students," which, they claimed, means teachers must be trained in the instruction of persons with handicaps and appropriate materials must be made available.

Plaintiffs claim that Heskett simply passed the Whites, letter to his subordinate, Melodie Freideback. Plaintiffs claim that she placed marginal notes on the letter, including "this is screwy" and "no requirement to comply with effective practices specific for autism."

Plaintiffs further claim that the November, 1995 issue of the *Express* contained inaccurate and misleading information in regards to Lovaas. Similarly, plaintiffs claim that the information contained in the August, 1996 issue of the *Express* is negative in tone. Plaintiffs further claim that the same issue announces an upcoming workshop called working with Students with Au-

tism in DTT Formats, a presentation described by plaintiffs as "decidedly negative," because it was accompanied by two Lovaas-negative activities, one specifically designed to train LEA IEP teams members to respond to parent requests to have "the teaching staff of their child trained in -Lovaas, at the district expense."

Plaintiffs also note that the November, 1995 Project ACCESS newsletter is the first newsletter to mention Lovaas programming. The Newsletter mentions Lovaas in the form of an announcement that Project ACCESS added to its lending library with a copy of a forty-four minute video. Project ACCESS described the video as follows:

> intensive early treatment using behavior modification principles in discrete trial format settings is thoroughly introduced. Good examples of reinforcement to teach new behaviors are shown and explained. Children of all functioning levels with a wide range of behaviors are shown in instructional situations.

Plaintiffs also claim that on December 11, 1995 and December 12, 1995, Project ACCESS devoted two more days of training in the Kansas City area operant conditioning, in which Lovaas is rooted, was presented as a concept of the "past." Similarly, plaintiffs claim that the May, 1996 Project ACCESS Newsletter added the following disclaimer: "Project ACCESS and Missouri DESE do not promote or endorse any study or program." Plaintiffs claim that by making this statement, defendant was indicating that it did not "adopt" any autism methodology for preschool children with autism, or any other children with autism.

Plaintiffs also note that from May 7, 1996 to May 8, 1996, Project ACCESS Autism Team Training presented a comparison between traditional behavior management and positive behavior support designed to discourage the use of any form of traditional behavior management, as narrow emphasis, short term (i.e. not the 1987-1993 Lovaas study protocol), favoring form over function, too simple, too dependent on consequences, aversive and punitive, reactive and able to decrease target behaviors but unable to teach functional skills.

Plaintiffs also note that the August, 1996 Project ACCESS *Express* Newsletter included a lead article by Donnelly concerning Lovaas. Plaintiffs claim that in the article, Donnelly attempted to move the current interest in Lovaas into interest in Donnellan and Simpson "watered down" discrete trial format use for compliance training only. Plaintiffs note that Donnelly *Express*ed concern about the controversy surrounding the claim for a "cure" and warned that "this is not a gentle method," and identified, as a problem, that Lovaas seemed to indicate that only he and his trained workers could do his method correctly. She also noted that getting the UCLA training and stamp of approval for Lovaas could be very expensive and drain family and school finances. Plaintiffs claim that she also made other criticisms of Lovaas, levels of recommended intensity and claimed that it trained behavior that is not meaningful, generalized or spontaneous, and that it did not account for sensory problems or give the child time for spontaneous play and time to learn to be a child or time to learn in groups. Donelly stated that the "children who seem to benefit the most from intensive behavior training are those who are nonverbal and noncompliant."

Plaintiffs further note that the 11-96 Project ACCESS *Express* Newsletter warned that individuals should proceed with caution with respect to autism sources older than five years as well as with methodologies describing themselves as "cures," "one size fits all" programs, price, hype, and party tricks. It also urged that methods of demonstrated validity should be chosen instead.

Plaintiffs claim that on January 16, 1997, defendant and Project ACCESS presented Working with Students with Autism in DTT Formats. Plaintiffs claim that the Workshop did not feature dissemination of Lovaas' research and was not designed to see Lovaas implemented for individual preschool children with autism. Plaintiffs claim it did not feature the 1987 or the 1993 studies. Instead, plaintiffs claim that many of the materials describe "watered down" and limited compliance training versions of DTT, specifically advising that DTT sessions be limited to fifteen to twenty minutes daily, five days per week (with a total of one hour and forty minutes per week). Plaintiffs claim that the Workshop concluded with the following two group activities indicating the workshop did not provide training in the Lovaas method of ABA:

> ACTIVITY: Rumor has it that you have now been trained in the "Lovaas" Method of behavior management (you know that is incorrect) so how do you respond to that misguided interpretations? (e.g.) WHAT HAVE YOU BEEN TRAINED TO DO HERE TODAY?
>
> ACTIVITY: Parents new to your school district want the teaching staff of their child trained in "Lovaas" at the district expense. WHAT WAYS

MIGHT BE CHOSEN TO RESPOND TO THIS REQUEST?

Plaintiffs, also claim that the article in the May, 1997 issue of the *Express* describes Lovaas as being based on limited research and counter to research in leading periodicals. In addition, plaintiffs argue that the information conveyed about Lovaas is unfavorably contrasted to other methods without any research support. Plaintiffs further note that while the August, 1997 issue of *Express* refers to videotapes by Lovaas, such tapes were published sixteen years earlier in 1981.

Plaintiffs further note that on August 18, 1997, Project ACCESS made another presentation of its Working with Students with Autism in Discrete Trial Formats with specific anti-Lovaas Activities, and continued to recommend use at twenty minutes per day only, which plaintiffs claim are clearly ineffective levels of intensity. Plaintiffs also note that on October 2 and 3, 1997, Project ACCESS held its "customary" "Introduction to Autism" Workshop in St. Louis, Missouri, which plaintiffs complain continue to assert that 85% of children with autism are mentally retarded and that 50% of them are functionally nonverbal, which lowers the expectations of students in a way that is inconsistent with "promising research." Plaintiffs also note that the Project ACCESS workshop on October 17, 1997, again recommends only one hour and forty minutes per week of discrete trial training.

Plaintiffs claim that for 1998, Project ACCESS prepared a one hour inservice About Autism, which clearly stated that ACCESS "does not endorse any packaged programs or curriculums to be used in full." Plaintiffs also claim that even in 1998, autism was described as a

lifelong disability, with no "cure" and with 85% individuals being retarded and 50% nonverbal. Plaintiffs claim that the Working with Students with Autism program was presented again on February 20, 1998, and again featured anti-Lovass activities.

Plaintiffs further note that a 1998 Project ACCESS packet included a statement stating, among other things, that the desire to find treatment practices is understandable and that many techniques improve performance; however, the statement also indicated that school programs providing an eclectic and individualized approach are appropriate. Furthermore, it grouped Lovaas with facilitated communication, auditory integration therapy, sensory integration therapy and dietary interventions with the following statement: no one method proven effective for all children. Similarly, plaintiffs claim that the current packet fails, with the exception of the inclusion of the 05-98 ACCESS *Express* newsletter), to disclose any information that would let a parent know about Lovaas instruction.

Plaintiffs claim that on May 27, 1998, a Memo issued from Heskett to other staff of defendant about ABA parents concerns, In the Memo, he acknowledged that Part H-First Steps was providing 30-40 hours per week of ABA, and that IEP committees "have been authorized to exceed the normal service guidelines when necessary and appropriate to meet the needs of the child," and that defendant would pay all costs up to the age of five. The Memo also indicates that plans were underway to convene a defendant-parent meeting (which took place on June 30, 1998) in order to share such information. Defendant's normal service guidelines are twelve hours per week and home visits for three to four year olds. Plaintiffs note that State Expert Freeman tries to offer

input to the school district in regards to a level of hours per week for two to five year olds with autism, after comprehensive assessment of where the child is, and advocates for early intervention, meaning that families should push for five to six hour programs by age three, and that for some children, the need of a minimum of a six hour program is "primary," "mandatory," and "critical from age three for most children," without disagreement or argument among professionals.

Plaintiffs further claim that on June 18 and 19, 1998, Project ACCESS continued to present its Introduction to Autism workshop, disseminating as "information" that autism is a lifelong disability, for which there is no cure, with 85% of individuals retarded, and 50% of individuals non-verbal.

As further evidence of the "promising" nature of the Lovaas methodology, plaintiffs note that on June 16, 1998, Governor Mel Carnahan wrote to a parent Baak, in response to a letter of May 18, 1998 in regard to ABA therapy for children with autism, that "ABA has proven to be a positive treatment for some children with developmental disabilities" and that "Its success is an exciting development in the field of special education." He also advised that officials with defendant had advised him "that ABA is an approved program of treatment for children enrolled in special education and can be administered as directed by the student's IEP." He also claimed that the "state cannot require public schools to authorize ABA services" and described the due process appeals system as an available resource for dealing with individual disputes. Finally, he claimed that defendant "does, however, ensure that school districts are well acquainted with promising new therapies, including ABA."

On June 19, 1998, Heskett provided a suggested response to Senator Ted House. He responded in the following manner: "Over the years several treatment or intervention models have been suggested as highly effective re: autism. ABA has captured the attention of several people now. It is my desire to ensure that adequate information and technical assistance is available to both First Steps and LEAs to ensure appropriate services are available."

In addition, plaintiffs claim that one employee of the Department of Mental Health felt that defendant was giving contradictory messages in regards to parent requests for intensive ABA programs forty hours per week. He believed that guidelines with respect to such requests would have been beneficial.

Plaintiffs claim that on June 29, 1998, defendant acknowledged that Missouri's First Steps program had some children with autism receiving services under the framework of ABA with demonstrated success. Defendant also described an upcoming special Education Directors meeting on June 30, 1998 as a process to resolve Lovaas issues. The meeting was attended by representatives from defendant and other educational entities as well as school districts.

On July 27, 1998, the defendant ABA Autism Finance Subcommittee met and quickly removed any financial or fiscal hurdles to actually paying for Lovaas instruction for Early Childhood Special Education students in Missouri and described available funding options for older students. Thus, the only remaining burdens for instruction were philosophical, and matters of teacher training and consulting capacity.

On September 28, 1998, Project ACCESS presented an expanded version of Working with Students with Autism at Cape Girardeau. It included more materials on data collection, but, according to plaintiffs, still included anti-Lovaas activities.

Plaintiffs claim that on September 30, 1998, Clinical Psychologist Gregory A. Holiday sent an e-mail to Heskett and members of the ABA Training and Capacity Subcommittee that the University of Missouri's Assessment and Consultation Clinic in the Department of Educational and Consulting Psychology in the College of Education was prepared to partner with defendant, the Department of Mental Health, and parent groups to develop and deliver a" range of services designed to increase Lovaas services by hiring, training and supervising a cadre of consultant level individuals (to include Craig Thomas of The Childhood Learning Center) to work under the supervision of a licensed psychologist and credentialed educator, by conducting research and evaluation, collecting quality data to support good parental and professional judgment, and by training undergraduate and graduate students to help implement Lovaas programs. Plaintiffs claim that Holiday and his institution were willing to coordinate training activities with those of Project ACCESS; however, plaintiffs claim that defendant chose not to fund such a program, and that very few of the newly-developed activities planned by the committee were followed to completion.

Plaintiffs allege that between October 21 and 23, 1998, Project ACCESS presented a new Workshop entitled "Early Intervention for Young Children with Autism (0-6 years) . Materials and concepts developed in earlier Project ACCESS workshops were used exten-

sively, including emphasis on sensory integration, and first altering the environment and adapting the curriculum ahead of teaching the child to talk or to acquire other skills. Plaintiffs further claim that the information presented on discrete trial teaching was limited to Donnellan and Simpson materials limiting the use of this technique to teaching compliance and providing no more than fifteen to twenty minutes per day, or about one and one-half hours per week, of this method.

Plaintiffs note that in e-mail communications, Donnelly admits that neither she or Project ACCESS could meet the need for training and capacity in Lovaas instruction. In addition, plaintiffs claim that Heskett admitted that he "suspects there will be changes," and denies any effort to suggest that Project ACCESS has everything Missouri needs for training. Instead, plaintiffs claim that he believes that the intent is to have Project ACCESS serve as the point of coordination, and admitting that Project ACCESS staff "are not adequately prepared to train on the Lovaas styled ABA." For this type of training, they claim that Project ACCESS would need to contract for the necessary expertise.

Plaintiffs note that on February 26, 1999, angry parents in St. Charles County observed Project ACCESS teacher training workshops on DTT and protested strongly about their content to Project ACCESS and Columbia-Donnelly. Plaintiffs claim that at this time, Donnelly admitted that she and her staff were unable to meet the need for Lovaas training and capacity in the state of Missouri.

Plaintiffs claim that on April 6, 1999, Heskett issued a Memorandum to all LEA Special Education Directors advising that the Show Me How Technical Assistance

bulletins "provided guidance regarding requirements under the IDEA for both Part C [First Steps] and Part B [ECSE ages and above] with respect to intensive services, instructional strategies and methodology." The Memorandum admits that "[i]n several instances IEP committees have concluded that intensive services, such as ABA/DTT, are required for a particular child only to find that Lovaas sanctioned service providers are unavailable in the district, and that contractual services were limited and costly." The Memorandum claims that the "goal is to seek ways to expand capacity in the state to offer support for [Lovaas] services in the schools . . ." and specifically reporting that current "discussions are developing with faculty from the University of Missouri-Columbia." The Memorandum goes on to state that Dr. Holiday had participated in discussions which were focusing on development of training, program support and research.

Plaintiffs claim that by June 28, 1999, the work of the Autism Task Force was closed down as a result of a Heskett letter to all members. Plaintiffs further claim that there is no current on-going statewide autism committee addressing the Lovaas issue as before. Plaintiffs note that as of June 28, 1999, Heskett also reported, with respect to increasing Lovaas training and capacity, that "we are attempting to finalize discussions with the Pennsylvania State Department of Education and the Pennsylvania State University to make training available . . . [through] four courses delivered via distance learning, which utilized resources in Pennsylvania and Florida." He also stated that the "first two courses are designed to support direct providers in their implementation of intensive services such as [Lovaas] styled programming" while the "second two courses are de-

signed to support the training of individuals to design, evaluate, and support the direct implementation of these services." He indicated that he hoped discussions would be completed by the end of the summer with courses to begin in January, 2000.

Heskett indicated that defendant had considered a joint effort with the University of Missouri, but believed the Pennsylvania opportunity was already developed, was designed to allow individuals to achieve professional standing with the national ABA Association, and was available via distance learning. He indicated that he felt as if it was better to pursue such resource rather than develop a duplicate resource within the state; however, plaintiffs note that Dr. Holiday remains prepared to partner with defendant to develop and deliver intensive ABA services to young children with autism age three and above as a priority, and to hire, train, and supervise a group of consultant level individuals who could design and monitor intensive ABA programs throughout the state for $150,000.00.

Plaintiffs claim that in October, 1999, the Department of Mental Health signed a purchase of services contract with Dr. Holiday and Craig Thomas of The Childhood Learning Center for less than $40,000.00 to fulfill an earlier joint defendant Department of Mental Health funding commitment arising within the 1998-1999 ABA Autism Task Force meetings which defendant has not fulfilled. Plaintiffs claim that defendant's current Assistant Commissioner of Education for Special Education, Barr, finds the Pennsylvania option too costly at $200,000.00.

In addition, plaintiffs assert that Dr. Bartman, the head administrator of defendant, admitted as late as

September 16, 1998, that "Missouri policy makers are attempting to respond to difficult issues such as [Lovaas techniques] in a coherent fashion," but have been unable to do so, and rather than exercising "choice of methodology," have adopted a "position of neutrality." Plaintiffs argue that defendant does not promote or support any particular methodology. Plaintiffs also note that defendant's expert witness, Dr. Julie Donnelly, has admitted that neither she nor Project ACCESS staff were able to meet the need for Lovaas training and capacity in Missouri, even as late as February 26, 1999. Plaintiffs further note the Heskett also admitted on February 2, 1999 that Project ACCESS staff "are not adequately prepared to train on the Lovaas styled ABA. For this type of training, ACCESS would need to contract for the necessary expertise."

Plaintiffs further claim that defendant has failed to fund any ABA training and capacity proposal, including one from Dr. Greg Holiday that was developed by the ABA task force from the summer of 1998 to the summer of 1999. Plaintiffs also claim that the description of Project ACCESS, as set forth in the State Plan, is inaccurate. Plaintiffs claim that Project ACCESS operates without meaningful oversight or direction from either defendant or a qualified professional or parent advisory board. Furthermore, plaintiffs claim that the publications of the CISE in the form of Technical Assistance Bulletins authored by defendant's Paula Goff, and First Steps Autism ABA Guidelines for the birth to three age group are at significant variance with other defendant and Project ACCESS communications on the subject of Lovaas early intervention for young children with autism.

In addition to this evidence, plaintiffs note that Heskett indicated in his testimony that defendant was aware that under the IDEA, once a disability is identified, a person on an IEP team must have expertise in the identified disability, meaning that when "autism" was added to the IDEA, it had implications for the qualifications of personnel who must attend IEP's of children with that disability. Finally, plaintiffs claim that from 1994 to 1998, the First Steps brochure made no specific mention of autism or of the importance of early autism diagnosis. Plaintiffs also claim that at this time, there are no plans to use the CHAT screening instrument in Missouri.

In addition to the other evidence, plaintiffs note that several states, including Iowa, Kansas, Michigan, Connecticut, California, Massachusetts, New York, and Maine, have disseminated information concerning ABA/DTT methodologies and adopted it as appropriate for children with autism.

G. PLAINTIFFS' EXPERT TESTIMONY IN REGARDS TO EARY IDENTIFICATION OF CHILDREN WITH AUTISM AND DEFENDANT'S ALLEGED FAILURES WITH RESPECT TO THE LOVAAS METHODOLOGY.

Plaintiffs, expert, Dr. Meinhold, has examined and evaluated defendant's procedures for identifying young children with autism. She will testify in regards to the "urgency of the need to make accurate differential diagnoses . . . as early as possible," because such children have been shown to be able to "make extraordinary gains when provided with intensive behavioral intervention early in development." She criticizes defendant's

approach of a "[g]eneric designation of children as developmentally delayed or disabled," as failing to "promote early identification of Autism," and resulting in the tendency to "channel children into generic early childhood special education programming," which "has not published empirical support with Autistic children."

Plaintiffs note that defendant's experts do not disagree with the need for early identification and that promising screening devices, like the CHAT, are available, which must be administered by mental health professionals who understand autism and have knowledge of follow-up programs available in the region. Plaintiffs claim that the experts agree that differential and early diagnosis of autism is "'mandatory" and "critical" since the early 1990's. Plaintiffs further note that psychologists in almost every state are able to make differential diagnoses of autism and make a referral to special education. Plaintiffs note that such diagnosis should be done by an experienced clinician, and should lead to appropriate assessment and treatment recommendations in a process that may take several months. Plaintiffs claims that the expert testimony will establish that a basic multidisciplinary team would include a psychologist, a child psychiatrist, a special education teacher, an occupational therapist, a recreational therapist, a speech and language pathologist, a nurse, and a social worker.

Plaintiffs, claim that defendant's expert Freeman indicates that he has held these beliefs in regards to autism since the late 1980s and early 1990s with the addition of parent education about autism and IDEA legal rights. Plaintiffs also note that Donnelly testified that there is "not a lot" of hands-on parent education in the state of Missouri.

In addition, plaintiffs claim that Freeman stated that autism screening and diagnosis is a source of "constant frustration" and many changes need to be undertaken in Missouri to recognize the symptoms of autism. He testified that parents usually become concerned when a child reaches eighteen months or two years of age and diagnosis is usually made between the ages of two and three. He testified that when parents call him and are concerned, he doesn't believe a screening device is necessary, but instead, the parents need to get to an evaluation. He also testified that any child needs a complete diagnostic evaluation whenever there are concerns about early development, and that even when a child passes the CHAT test, he would not rule out autism completely in all situations. Finally, Freeman testified that children going to a pediatrician who are not developing language should be referred to special education.

Meinhold also *Expresses* her opinion in regards to the need for appropriate expertise on the educational team for children with autism. She believes a professional trained in differential psychological diagnosis in early childhood is an essential member of any educational team making initial educational placement and planning decisions for very young children with disabilities. She will also testify that staff should have training in regards to the detection of the most important social and language disorders associated with autism.

Dr. Meinhold also notes that she has observed that defendant "relies heavily" on Project ACCESS for dissemination of information. She claims that such information is seriously deficient in the manner that follows:

> [Defendant] has been relying on a highly selective sampling of these resources and relying on an often inaccurate characterization of the state of the science in Autism education and treatment. This has caused them to remain far from their goal (and mandate) of providing students with Autistic Disorder effective programs of education and related services.

Dr. Meinhold explains that from the ACCESS materials, she "was able to detect an ideology (or set of assumptions) about students with Autistic Disorder and their needs" that features support over change of behaviors, focuses on adjustments and accommodations and teaches "Acceptance of the disability" as a "primary goal for the students and families." She describes the "specific treatment and educational technologies . . . which are prominently featured in ACCESS materials," and concludes that while "[defendant] and ACCESS claim to select and disseminate educational practices that are 'effective and data based,'" the procedures they support and adopt can not be described as either of these. Instead, Dr. Meinhold states that with minor exceptions, the procedures disseminated by ACCESS "are entirely without peer reviewed, published scientific support." In fact, she claims, "in some instances they have been shown to be ineffective in peer reviewed, published scientific work."

Dr. Meinhold describes the Lovaas 1987 reported research as "one of the best controlled and conducted research evaluations in the literature on the treatment and education of children with Autism," and, she notes that it "has received unprecedented attention in the field since its publication over ten years ago." She explains that, contrary to the ideology or assumptions of

defendant and ACCESS with respect to children with autism having a predictable course of learning that must be supported, accommodated, and accepted, "Ivar Lovaas and his colleagues have convincingly demonstrated that early intensive environmental events (discrete trial treatment) can produce dramatically different outcomes despite the likely neurological underpinnings of the disorder."

Dr. Meinhold concludes that "ACCESS staff were aware of the existence of the Lovaas 1987 outcome study, the 1993 follow up of those subjects and related research reports," but, for some reason that she was unable to discern, "they chose to withhold these extraordinary empirical findings from parents and teachers seeking advice about effective interventions for preschoolers with Autism." Dr. Meinhold also is unable to understand "why [defendant] chose not to disseminate this most promising intervention on their own once they became aware of it, and once they became aware that it was not represented in the ACCESS program material." She also stated that "although the ACCESS program (and relevant [defendant] administrators and staff) were clearly aware of the Lovaas and related outcome studies in the early 1990's, they do not appear to have been in support of this extraordinarily effect (sic) treatment and did not distribute the relevant features of this research to parents and staff."

According to Dr. Meinhold, not only did defendant and ACCESS choose not to disseminate the positive information about Lovaas, but, instead, disseminated inaccurate information about such program. In fact, she claims that "[i]naccuracies were sometimes so significant that frank misinformation about behavior analysis in general and discrete trial training in particular was

presented as expert training to [defendant's] staff and parents."

Plaintiffs note that defendant's experts agree that the information disseminated by defendant and ACCESS about poor prognosis for children with autism is wrong, noting that there "is still a lot of misinformation out there, that the prognosis for children with autism is poor. The reality is the prognosis for children with autism is pretty good with intervention." These experts claimed that better prognosis for autistic children has been known since at least 1995.

H. PLAINTIFFS' EXPERT TESTIMONY WITH RESPECT TO PROMISING RESEARCH IN THE EDUCATION OF CHILDREN WITH AUTISM.

Plaintiffs would present expert witness Dr. Tristram Harry Smith, of the Department of Psychology, Washington State University, Pullman, Washington to testify in regards to many issues in regards to Lovaas. He is a highly qualified individual and has, since 1990, testified in a variety of due process cases involving preschool children with autism. Dr. Smith was involved in both the 1987 and 1993 Lovaas research studies allegedly criticized by defendant's experts. He has explained that these studies were published in peer-reviewed journals of long professional standing. The purpose of peer review was to obtain independent assurance that the research is of technically sound quality. Dr. Smith has testified that the publication of five peer commentaries on the 1993 study was an unusual mark of the study's distinction. Speaking generally, he has also stated that, in his opinion, the prognosis of a preschool child with autism not given the Lovaas treat-

ment is that they don't really improve and are "really pretty impaired." He opined that the prognosis when given the Lovaas treatment is "significantly better," but with "big individual differences in the outcome."

Dr. Smith has identified five published attempts to replicate or partially replicate the Lovaas treatment procedure and study outcomes. These included a May Center study by Steve Anderson, an Australian study by J. Birnbauer and Dave Leach, and a Princeton Child Development Institute study. In the May Center study, Dr. Smith testified that there were comments and observations made with respect to the differential rates of learning on certain tasks when they were addressed by the treatment procedure as opposed to the rates of learning for those children in concurrent public special education programs, and that the kids', rate of learning picked up quite a bit when behavioral treatment began, and that before that, there really was not much change. Testifying generally about the form of programming which he helped Dr. Lovaas develop, Dr. Smith stated that very young autistic children are developmentally ready for such therapy at home. He also testified that children who start Lovaas treatment before age five ended up in less restrictive placements than kids who started older than five.

I. THE ALLEGED RELATIONSHIP BETWEEN DEFENDANT'S ACTIONS AND DANIEL ASBURY AND PLAINTIFFS' ADMINISTRATIVE AND COURT PROCEEDINGS IN THIS MATTER.

Plaintiffs claim that because of the manner in which autism has been addressed by defendant, by 1991, the

year Daniel was born, defendant had already set him up for discrimination vis a vis children with other sensory disabilities such as blindness and deafness. Plaintiffs claim that defendant requires identification of a visual or auditory impairment as part of the diagnosis of such children with those disabilities, but precludes identification of other specific disability categories, such as autism. Plaintiffs claim that because of this fact, in combination with the effective Lovaas methodology for children diagnoses at a young age, Daniel and other children with autism are discriminated against when their disabilities are not "red flagged" in the same manner as blind or deaf children in the "non-categorical" ages.

On June 24, 1993, Daniel was, at the age of two years, examined by Dr. Dennis Altman, a specialist in Infant, Child and Adolescent Neuropathology. While plaintiffs claim that they never sought or viewed any of Dr. Altman's records and that they were unaware of his views in regard to Daniel and autism until just prior to a due process hearing in this matter in 1998, Dr. Altman stated the following in reports or records as follows:

> Daniel has a neurological syndrome that is best described as a pervasive developmental disorder. He has many features of childhood autism.

Subsequent to this statement in a record, Dr. Altman stated the following on July 28, 1993:

> In summary, Daniel is a two year old boy who has a neurological syndrome characterized by severe language deficits, deficient social interactions and some repetitive behaviors. There does not appear to be a definable biological cause for his syndrome. His

> syndrome may well be the features of childhood autism or a pervasive developmental delay. I think we should observe his behavior and development over the next year before a more definite diagnosis is made. I have recommended that Daniel be enrolled in an infant stimulation program as well as a language program and I gave the name of a number of programs to Mrs. Asbury. She has been in contact with the Parents as Teachers program and they have given some recommendations on their own.

Then, on January 11, 1994, Dr. Altman stated as follows:

> Daniel and Ms. Asbury returned to the office today in follow up. As you recall, he has a pervasive developmental disorder with many features of autism. Biologic investigation did not reveal a specific etiology. Since last seen, he has made some progress. He now receives schooling at Fontbonne and is in their language program . . . In summary, Daniel continues to exhibit a neurological profile with delayed language, poor social interaction and some repetitive behaviors. His features are now becoming more typical of childhood autism. I indicated to Mrs. Asbury that she should continue with language based programs, and that Daniel would require these services at least for the next months and years. I suspect that he will have a neurological condition that will best fit with childhood autism. This will be discussed in great depth at the next visit in six months.

On September 2, 1994, Dr. Altman stated as follows:

> I saw Daniel in the office today. As you recall, he has a pervasive developmental disorder with many features of childhood autism. I think they have been stable the last six months. He has been evaluated by the Special School district and services are to be instituted this fall . . . I again discussed Daniel's pervasive developmental delay and discussed autism. I think Mrs. Asbury has a good understanding. I have recommended ongoing parenting and school services.

Plaintiffs allege that during the summer of 1994, Daniel's evaluation continued by SSD staff, without the staff advising them that they suspected or confirmed his autism. The SSD diagnosed him as "eligible for early childhood special education," with no specific identification of him as a child with autism. Defendant's expert Donnelly, when confronted with the 1993 videotape of Daniel's special education evaluation at Fontbonne Clinic, allegedly stated that she would have suspected that Daniel had autism at that time. Plaintiffs claim that notwithstanding the fact that the experts indicate that parents benefit from having a label placed on their child and from proper screening in order to determine if such a label is appropriate, inappropriate and unprofessional behavior occurred in direct reliance on defendant's policy, in the manner complained of by Rick White, in the case of Daniel.

The plaintiffs did use the services available to children with disabilities offered by, at a minimum, Parents as Teachers, Fontbonne school, and the Special School District of St. Louis County. Plaintiffs note that on August 5, 1994, Daniel's SSD IEP provided for eleven and one-half hours per week of ECSE classroom services and one hour per week of speech and language pathol-

ogy services. Plaintiffs claim that four IEP goals in four settings were proposed to be achieved by play-based therapy to develop skills embedded in age-appropriate activities, exactly the same sort of IEP Project ACCESS was advocating at that time. The SSD claimed that such placement was necessary in light of the fact that Daniel needed "intensive intervention."

Plaintiffs claim that State Expert Freeman opined in a written report that Daniel received "appropriate" early intervention, but revised her review at deposition in order to remove the word "appropriate." Plaintiffs also alleged that State Expert Donnelly was provided many records and chronology related to Daniel, but was not asked to give an opinion in regard to his early intervention program. Thus, plaintiffs claim that no expert for the defense contradicts their position that Daniel was denied an appropriate education by the SSD.

On April 17, 1995, after Daniel's first year in SSD's self-contained ECSE 12 hour per week program, his parents were notified to attend an IEP meeting to develop his second IEP. Plaintiffs claim that the only expected participants listed on the notice were his speech and language pathologist and an LEA representative. On April 28, 1995, plaintiffs claim that Daniel's IEP was prepared without an autism expert and no recognition of the educational significance of his obvious autism. They claim he was offered only 10.5 hours per week of generic ECSE in a self-contained SSD classroom, with no inclusion and no extended year services. Plaintiffs claim that Teacher Broughton justified such placement, because Daniel's "developmental needs require a highly intensive educational program of special education and related services."

Plaintiffs claim that in May, 1996, without knowing there was public funding available for Lovaas, they began providing Lovaas to Daniel at home 35-42 hours per week, using only Catherine Maurice's manual, *The Behavioral Treatment of Autistic Children*, as a guide. Plaintiffs claim Daniel responded robustly to this intervention, which is detailed in a report by Drs. James Mulick and Laura Williams. Plaintiffs claim that by July, 1996, they had located experienced Lovaas consulting services from the Center for Autism and Related Disorders, Dr. Doreen Granpeesheh, Clinical Psychologist and Director, of Encino, California.

Plaintiffs note that at an IEP meeting on March 5, 1997, school staff admitted that Daniel's skills and gains attributable to Lovaas were generalizing to the school classroom about three weeks after being acquired at home, and that he was much better task-focused at home 1:1 and was distracted from learning in the 10 child classroom, and that his progress with Lovaas from September, 1996 to January, 1997 was "amazing." Plaintiffs followed-up this meeting with a letter requesting the inclusion of a qualified ABA expert on the IEP team, and a written answer from the school.

Plaintiffs claim that on May 27, 1997, an IEP-Reassessment meeting was held in regards to Daniel. Plaintiffs note that the staff again noted Daniel's improvement. Plaintiffs also claim that it became clear that SSD was not going to fund or provide Lovaas programming at school or home for Daniel, but would allow him to stay at his home for one-half an hour per day.

Plaintiffs allege that on June 2, 1997, they wrote a letter to the school staff distributing the recommendations of Dr. Katharine Calouri, *see infra.*, and request-

ing a full inclusion Kindergarten setting, extensive speech and language pathology services and Lovaas services of 35-40 hours per week and requesting the reasons for the rejection of ABA and the scientific rationale behind the policy chosen by SSD, in writing.

Plaintiffs claim that on June 9, 1997, another IEP meeting was held in regard to Daniel and proper placement for him. In addition, plaintiffs claim they were told, by Kathy Jackson, that Irene Orlando, Jackson's superior, had directed that they do not put "methodology into IEPs" and that Daniel's paraprofessional aide would not be trained in Lovaas. Plaintiffs claim that notwithstanding this statement, Jackson admitted that Daniel needed a 1:1 paraprofessional aide, but indicated that unless the money to fund the position was approved, Daniel might not have one. Plaintiffs also claim that Lovaas would not be provided to Daniel because he was seen (contrary to previous staff admissions) as having a problem with generalizing. Plaintiffs claim that the methodology was described by Jackson as "holistic," not specific. Plaintiffs also allege that other staff clearly indicated that four hours per day of 1:1 instruction of any kind was not possible with the case loads, and 1:1 instruction was a method from 8-9 years in the past. Plaintiffs further allege that their request for extended school day and extended school week services were met with a blanket refusal from Jackson, because she claimed they were responsible for regular school day hours only; however, plaintiffs claim that she did propose the Project ACCESS concept of a school teaching team or collaborative meetings on a regular two week to one month basis, with an inclusion facilitator called in to facilitate these thirty minute meetings. Plaintiffs claim the parties verbally agreed to such an arrangement, but it never appeared in the written IEP.

Plaintiffs claim that the meeting proceeded upon the assumption that they would continue to provide Lovaas at home and provide transportation. In addition, plaintiffs claim that Jackson called Project ACCESS for help. In addition, plaintiffs claim that Heskett, who was consulting with SSD staff, stated that nothing in the literature indicated that any particular child presumptively needed a Lovaas program or an intensive program.

On August 28, 1997, Daniel started Kindergarten. He was also served by SSD autism itinerant (and 1994 Project ACCESS Missouri Autism Consultant) Peggy Cassani. On September 8, 1997, she issued a memo with suggestions for working with Daniel, based upon her observations. Plaintiffs claim that all her suggestions are consistent with Project ACCESS' outdated training literature concerning working with children with autism. Plaintiffs make specific note of the fact that Cassani did not suggest Lovaas instruction.

On June 3, 1998, Heskett wrote a letter to Mrs. Asbury to summarize a conversation between them. In it, he claims that defendant has developed both program and fiscal policy which allows IFSP committees in First Steps and IEP committees for three to five year olds to make decisions regarding the implementation of Lovaas services with certain children. New fiscal policies which provide for defendant to pay 100% of the cots of such programming to LEAs are described as well; however, plaintiffs claim that with respect to programming policy, Heskett admits that defendant had advised LEAs that the IDEA does not requires LEAs to use the IEP to specify instructional methodology. Furthermore, plaintiffs claim that he admits that while LEAs are not required to document methodology in the IEP, if they do,

defendant has advised LEAs that they are accountable for the implementation of the methodology referenced in the IEP. Plaintiffs claim that he also admits that defendant advised LEAs that it is not the best practice to "name" a methodology within the IEP. Plaintiffs claim that with such advice from defendant, no LEA would be motivated to even consider writing Lovaas into the IEP such that implementation of actual methodology would be enforceable by the parents in due process.

Plaintiffs claim that Heskett then discussed plans to convene committees to address Lovaas issues so that fiscal and program policies that defendant put in place do not prevent appropriate entities from making the program and fiscal commitments necessary to respond to the needs of individual children. He also states that defendant is interested in ensuring that training resources in Missouri, such as Project ACCESS, have the capacity to support the training and technical needs of schools districts and parents in implementation of methodologies consistent with Lovaas. According to plaintiffs, he also *Expresses* concern about relying on individuals from outside the state for assistance in implementing Lovaas methodology. Thus, according to plaintiffs, the letter makes clear that defendant's policy on fiscal barriers had changed to allow for Lovaas to be funded, but its policy on programming policies remained "hands-off" with respect to LEAs and Project ACCESS. Plaintiffs further claim that Heskett's statements are "fairly subtle telegraphing" to LEAs that they did not need to provide Lovaas programming, and certainly did not need to commit themselves to implement Lovaas programming in a fashion that would be enforceable in due process.

Plaintiffs expect to present the testimony of Dr. Meinhold to establish injury to Daniel. She would testify that his IEP included "group early educational intervention (in a play and language based classroom situation), and manual signing, up to about 10.5 hours per week," showed no indication that "discrete trial training was implemented," and "did not appear to focus on the direct training of key cornerstone skills as prescribed in the behavior analysis literature." She found the educational approach provided "consistent with the overall ideology and selective response to the research literature," disseminated by defendant and Project ACCESS.

Plaintiffs indicate that another expert witness, Dr. Katharine Calouri, would testify in regards to the appropriateness of the public education provided to Daniel prior to the time his parents developed a Lovaas program of their own. She opines that Daniel's special education was inappropriate as was his programming with SSD's speech and language pathologist; however, she praised the programming provided for him in a regular preschool setting where he was shadowed by his Lovaas therapist, Dena. Calouri made detailed recommendations about removing Daniel from SSD's special education classroom and placing him in a regular education classroom the next year with a 1:1 Center for Autism and Related Disorders-trained therapist-aide, and continuation of his Lovaas home-based programming.

Plaintiffs claim that on July 3, 1997, Dr. Calouri reviewed the then-current IEP proposed by SSD and opined that the offer was inadequate to meet Daniel's needs and did hot offer a free, appropriate public education. Her overall opinion was that Daniel received the

most benefit from his home-based ABA program, did well in his time in the regular classroom with an ABA-trained aide, and the special education programs provided by SSD were inappropriate for Daniel.

Plaintiffs claim that the continuing Lovaas program has provided Daniel with many functional skills, which have allowed a verbal, well-behaved, reading, motivated, observant Daniel to be very successfully mainstreamed into second grade regular education classroom with typically-developing peers, with appropriate Lovaas-trained paraprofessional support for some of his continued limitations as a child with autism. Plaintiffs allege that he is able to participate in educational testing, and although some of his verbal IQ test scores fall below 70, he is not mentally retarded, and can care for himself at an age appropriate level. Plaintiffs claim Daniel will need special education support services throughout his school years and probably during his transition into adulthood, including vocational rehabilitation services, notwithstanding his academic abilities. Plaintiffs claim he will be at risk of depression and social isolation as an adolescent and an adult. Plaintiffs finally note that he will probably not be eligible for Social Security and its associated medical benefits.

Heskett testified that he, and defendant, first learned of Daniel and his IEP when the plaintiffs filed their due process request with the Special School District of St. Louis County. The plaintiffs submitted their Complaint and Request for Due Process Hearing on November 20, 1997 after giving notice of their complaints to SSD on August 22, 1997. Defendant was initially named as a defendant in that proceeding, but was dismissed later. On or about May 22, 1998, plaintiffs entered into a Settlement and Release Agreement with the Special

School District of St. Louis County. The Agreement contained a Mutual Release provision that provided as follows:

> The Asburys jointly and severally release and waive any and all claims against the SSD, its Board of Education, its administration and employees, under the IDEA, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Missouri state special education statutes, with respect to the provision of a free appropriate public education for Daniel and for any and all claims for personal injuries, including but not limited to physical injuries, allegedly suffered by Daniel, up to and including the date of this agreement. The District, including its agents and employees, release the Asburys, including their agents, representatives, and heirs, from any and all claims they have or may have against them arising out of any facts or events relating to the IDEA, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Missouri state special education statutes that occurred up to and including the date of this agreement.

Plaintiffs then brought this instant action against defendant on June 12, 1998. On January 21, 1999, this Court granted defendant's Motion to Dismiss with respect to all of plaintiffs' claims related to actions allegedly taken by defendant more than two years prior to plaintiffs' filing of an administrative complaint against defendant. The Court concluded that such claims advanced by plaintiffs were barred by the applicable statute of limitations.

During the discovery in this matter, defendant propounded an interrogatory to plaintiffs inquiring as to whether they ever notified defendant that they believed Daniel was not receiving a free and appropriate education. After referring defendant to the due process hearing exhibits, plaintiffs stated as follows:

> Supplemental Answer:
>
> See the Supplemental Answer to Interrogatory No. 5 for the proposition that [defendant's] duty to Daniel Asbury is affirmative in nature, and does not require Daniel Asbury to "ring [defendant's] phone" or otherwise "notice" [defendant]
>
> . . .

In addition, defendant propounded an interrogatory to plaintiffs asking them if they believed that the Lovaas methodology is the only appropriate methodology for preschool children and early school age children with autism. Plaintiffs responded by stating "Yes." However, plaintiffs state in their papers that they believe that defendant should be able to disseminate information in regards to other promising practices as well.

Following the period of discovery, the defendant now brings this instant motion for summary judgment. Defendant argues that it is entitled to summary judgment on all of plaintiffs' claims against it for the reasons set forth *supra*.

II. STANDARDS GOVERNING MOTIONS FOR SUMMARY JUDGMENT.

The standards applicable to summary judgment motions are well settled. Pursuant to Federal Rule of Civil Procedure 56 (c), a court may grant a motion for sum-

mary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1,986). The United States Supreme Court has noted that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Id.* at 327 (quoting Fed. R. Civ. P. 1).

In order to obtain summary judgment, the moving party must demonstrate "an absence of evidence to support the non-moving party's case." *Celotex,* 477 U.S. at 325. Once the moving party carries this burden, the nonmoving party must "do more than simple show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party may not rest on allegations or denials in the pleadings, but "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 587 (quoting Fed. R. Civ. P. 56 (3)).

In analyzing summary judgment motions, the Court is required to view the facts in a light most favorable to the non-moving party, and must give the non-moving party the benefit of any inferences that can logically be drawn from those facts. *Matsushita*, 475 U.S. at 587; *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). Moreover, this Court is required to resolve all conflicts in favor of the non-moving party. *Robert Johnson Grain Co. v. Chemical Interchange* Co., 541 F.2d 207, 210 (8th Cir. 1976). The trial court may not consider the credibility of the witnesses or weigh the evidence. *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992).

III THE IDEA.

The Court finds the following summary from *Community Living v. Romer*, 992 F.2d 1040, 1042-43 (10th Cir. 1993), informative in regards to the IDEA:

> The IDEA is a comprehensive statute enacted to ensure that all children with disabilities have access to "a free appropriate public education ... designed to meet their unique needs." § 20 U.S.C. 1400 (c); *see also Honig v. Doe*, 484 U.S. 305, 309, 108 S.Ct. 592, 596, 98 L.Ed.2d 686 (1988). The primary mechanism for implementing this goal is an individualized education program ("IEP"), which the act mandates for each child with a disability, tailored to the child's unique needs. §§ 20 U.S.C. 1401(a)(18), 1414(a)(5); *Honig*, 484 U.S. at 311, 108 S.Ct. at 598. The IEP is a written statement that sets forth the child's present performance level, goals and objectives, specific services that will enable the child to meet those goals, and evaluation criteria and procedures to determine whether the child has met the goals. § 20 U.S.C. 1401(a)(20).

Under the IDEA, each state must submit a plan to the Secretary of Education, who provides federal funds to the state. 20 U.S.C. §§ 1412-1414. Following this action, the state becomes responsible for distributing funds to the LEAs and implementing policies and procedures for the proper expenditure of funds by the LEA. §§ 1413(a), 1414(b). In order to receive funds from the state, an LEA must apply to the state education agency (SEA) and assure the agency that it complies with the IDEA. Once these steps are taken, the LEA is able to apply the funds to services for disabled children.

Thus, as some courts have noted when considering these provisions, the SEA retains supervisory authority under the IDEA, because it remains responsible "for administering funds, setting up policies and procedures to ensure local compliance with IDEA, and filling in for the LEA by providing services directly to students in need where the LEA is either unable or unwilling to establish and maintain programs in compliance with IDEA." *Gadsby v. Grasmick*, 109 F.3d 940, 943 (4th Cir. 1997). The LEA remains "responsible for the direct provision of services under IDEA, including the development of an [IEP] for each disabled student, the expenditure of IDEA funds to establish programs in compliance with IDEA, and the maintenance of records and the supply of information to the SEA as needed to enable the SEA to function effectively in its supervisory role." *Id.*

The IDEA also contains safeguards to ensure that SEAs and LEAs are able to follow its guidelines. Under the IDEA, parties may present complaints in regards to the free appropriate public education received by their child. § 1415(b)(6). After a complaint is filed, the parties are entitled to an impartial hearing by either the SEA or the LEA. § 1415(f)(1). If the LEA conducts the hearing, the parties may appeal to the SEA. § 1415(g). If the parties feel that the decision of the SEA, acting as the initial hearing body or as the appellate body, was in error, they may then file a complaint in the United States district court. § 1415(I)(2).

In reviewing an IEP supplied to a child in accordance with the IDEA, the Court is mindful of the fact that while the IDEA requires "appropriate" education for a child, "it does not require a school district to provide a child with the specific educational placements that her

parents prefer." *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999) (citation omitted); *see also Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) (noting that the sufficiency of an education must be evaluated in light of the available resources) (citation omitted). In addition, the IDEA does not require a school district to "either maximize a student's potential or provide the best possible education at public expense." *Id.* (citation and internal quotations omitted). Therefore, the requirements of the IDEA are met whenever a disabled child receives education and services that have "some educational benefit." *Id.* (citation and internal quotations omitted).

IV DISCUSSION.

A. LIMITATION OF CLAIMS TO DANIEL ASBURY.

At the outset, the Court notes that plaintiffs have, at times, referred to other children with autism who have allegedly suffered harm as a result of the allegedly inappropriate actions or omissions of the defendant in this matter. While the Court does not necessarily believe that plaintiffs have made such statements in an effort to seek relief on behalf of individuals other than Daniel or in an effort to broaden the scope of review of these claims,[7] the Court believes now, as it did when it decided defendant's Motion to Dismiss, that it must only consider plaintiffs' claims to the extent that they involve Daniel Asbury. This case involves his education and

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[7] The Court believes that plaintiffs have made statements in regards to other children in order to indicate that the Court's decision with respect to Daniel may have an impact upon similarly situated children as well.

defendant's allegedly inappropriate actions with respect to him. Plaintiffs do not indicate how they have standing to litigate on behalf of other children. Therefore, the Court will only consider plaintiffs' claims to the extent that they relate to Daniel Asbury.

B. PLAINTIFFS' MAY NOT HOLD DEFENDANT RESPONSIBLE FOR ANY ALLEGED FAILURES OF THE SPECIAL SCHOOL DISTRICT IN PROVIDING DANIEL FAPE.

In order to further limit the scope of the Court's analysis, the Court notes that plaintiffs may not recover damages or otherwise receive any relief simply because the Special School District failed to provide FAPE to Daniel. As defendant notes, and plaintiffs do not contest, the defendant was not aware of Daniel's FAPE provided by the Special School District until it was named as a defendant in plaintiffs' administrative complaint and request for an impartial due process hearing. Because the local educational agencies are the entities directly responsible for putting in place an IEP, the Court does not believe that by providing that the SEA has primary supervisory authority with respect to programs under the IDEA, Congress intended to put in place a system whereby "any time a local agency trips up in that respect, the State agency is an absolute insurer required to make good the damage." *Beard*, 31 F.3d at 954 (noting that making the state agency the insurer is particularly inappropriate when "the local agency caved in as to the issue involved before the plaintiff class made any effort to involve [the state agency] in the dispute"); *see also T.H. v. Board of Educ. Of Palatine Comm. Cons. Sch. Dist.*, 55 F.Supp.2d 830, 847 (N.D. Ill. 1999) (citing and relying on *Beard)*; *Whitehead v. School Board For*

Hillsborough County, 932 F.Supp. 1393, 1395-96 (M.D. Fla. 1996) (finding that while the IDEA makes the state agency responsible for ensuring that children receive FAPE, this alone would not make the state agency liable for attorneys fees and noting that "[w]hat Plaintiffs may not do is attempt to piggyback the (state agency] claim on a favorable outcome previously reached against Defendant School Board").

However, the Court does not believe that this finding fundamentally alters its analysis of plaintiffs' claims. Plaintiffs state in their papers that they are not seeking to hold defendant liable simply because of the failures of the Special School District. Instead, plaintiffs claim that they are arguing that defendant is liable because its own procedural violations of the IDEA, which it was required to follow, resulted or contributed in the Special School District's failure to provide Daniel FAPE. The Court believes that plaintiffs' claims in this regard are not mere piggyback claims based upon any alleged failures of the Special School District. Instead, plaintiffs' claims are for injuries allegedly caused by defendant's alleged failures to comply with its own procedural duties as required under the statute. Thus, plaintiffs' claims for damages against defendant are not based merely upon theories of vicarious liability or respondeat superior, but are instead, claims against defendant directly for its own allegedly illegal actions. As plaintiffs note, the Eighth Circuit has stated that an IEP may be set aside in situations where "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefit." *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir.

1996) (internal quotations and citations omitted). Thus, the Eighth Circuit has indicated that the procedural components of the IDEA are important, and that serious violations of the procedural duties under the act are sufficient to invalidate an IEP. As a result, the Court believes that if a plaintiff could establish that a SEA committed serious violations of its procedural duties under the IDEA, a court could find such SEA in violation of the IDEA. Therefore, the Court will proceed to analyze plaintiffs' procedural claims *infra*.

C. PLAINTIFFS' CLAIM THAT DEFENDANT FAILED IN ITS CHILD FIND DUTIES.

In their first claim of procedural violation, plaintiffs allege that defendant has discriminated against Daniel Asbury by "failing to adopt and implement appropriate child find procedures." As part of this claim, plaintiffs also allege that "I.E.P. and evaluation teams in the State of Missouri are not appropriately informed concerning the need to identify children at risk of educational autism as early in life as possible, so that effective ABA/DTT/Lovaas intervention can begin before a child's crucial fifth birthday." As the Court noted in its Memorandum and Order with respect to defendant's Motion to Dismiss, the parties appeared to agree that the IDEA requires a state to have "in effect policies and procedures" to ensure that children with disabilities are "identified, located, and evaluated." 20 U.S.C. 1412(a)(3)(A); 20 U.S.C. § 1414(a)(1)(A)(1997). In their complaint, plaintiffs alleged that the state's procedures and policies are not effective to ensure that all children with disabilities are identified, located, and evaluated, and that such lack of effectiveness has harmed Daniel. Having reviewed the evidence supplied by the parties,

the Court concludes that this claim advanced by plaintiffs must fail as a matter of law.

First, the Court notes that defendant has come forward with uncontradicted evidence establishing that it has procedures and policies in place to ensure that children with disabilities are properly identified. Defendant provides services for children ages zero to three through an agreement with the Missouri Department of Mental Health and the Missouri Department of Health. Working with these agencies, defendant attempts to identify and evaluate children with disabilities, including infants and toddlers. Under the relevant interagency agreements, defendant ensures that the public is notified about the full educational opportunity timetable for preschool students and that information is provided with respect to the First Steps Program. Defendant requires each LEA to certify that it complies with such standards on an annual basis. Defendant requires each LEA to design and implement a comprehensive, continuous and periodic screening program designed to identify children with suspected disabilities. Defendant monitors the LEAs to ensure these goals are accomplished. In addition, the LEAs must also offer developmental screening to children between zero and five in order to comply with Missouri state law.

Also, defendant funds, and LEAs administer, the Parents as Teachers program. Defendant encourages LEAs to display notices about such program in all hospitals, and LEAs provide information about the program in new parent packages given to birthing nurseries throughout Missouri. Moreover, the Parents as Teachers National Center trains Parents as Teachers educators to conduct screening of children in the developmental areas of hearing, vision, motor skills,

and language/concepts. Parents as Teachers educators are also trained to make referrals to the First Steps Program, if the child is under the age of three. If the child is older than two, then the Parent as Teacher educator can refer the child to the LEA for the provision of FAPE. The Parent as Teacher educator may also refer the child to his or her primary care physician for further evaluation and treatment. Any parent who believes that his or her child has a disability may seek information from the LEA, which is designed to implement these services.

For these reasons, the Court must conclude that the undisputed evidence establishes that defendant has procedures and policies in place to identify, locate, and evaluate students with disabilities. While plaintiffs appear to take issue with such procedures and policies because they do not always single out and prescribe a specific program for children with autism, as opposed to other children with disabilities, the court notes that the IDEA specifically states that nothing requires children to be classified by their specific disability.[8] Therefore, the Court must conclude that defendant has proper procedures in place to find, identify, and locate children with disabilities.

Second, with respect to Daniel in particular, defendant has presented evidence in the form of medical records indicating that Daniel was identified as a child

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[8] 20 U.S.C. § 1412(a)(3)(B) provides as follows:

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

with autism just after his second birthday by an examining neurologist, Dr. Altman. He indicated in his records that he had "recommended that Daniel be enrolled in an infant stimulation program as well as a language program. Thus, the evidence indicates that even if defendant was required to ensure that children with autism were specifically identified as having autism, as opposed to a disability generally, Daniel was identified as a child with autism by Dr. Altman. At the very least, the fact that Dr. Altman's identification of Daniel as having autism resulted in Daniel's use of the services offered by parents as Teachers, Fontbonne school, and the Special School District indicates that any actual procedural error by defendant in regards to child find did not compromise the pupil's right to an appropriate education, seriously hamper the parents' opportunity to participate in the formulation process, or cause a deprivation of educational benefit that would otherwise not have been available as required under *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d at 562. To the contrary, the evidence indicates that Daniel received such services, and nothing, other than plaintiffs' insistence upon the Lovaas methodology, as opposed to any other methodology for teaching children with autism, indicates that Daniel would have received any other type of educational benefit had defendant specifically designated him as autistic.

Thus, like plaintiffs other criticisms of defendant's practices and policies in this matter, the plaintiffs' complaints in regards to the policies utilized by defendant with respect to defendant's child finding efforts stem from their belief that the Lovaas program is unquestionably the best program for children with au-

tism in general and Daniel in particular.[9] The Court notes that plaintiffs are not contending in this case that Daniel did not receive any educational services at all. Instead, their claim is based on defendant's alleged failure to act in a manner consistent with the Lovaas methodology. As defendant notes, however, and plaintiffs do not deny, Lovaas program was, and is, not accepted in the educational community as the only sound method of educating autistic children. Similarly, the parties agree that there is disagreement among some professionals in the field of autism regarding the efficacy of Dr. Baron-Cohen's research results and the

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[9] The Court notes that the parties dispute the type of relief requested by plaintiffs in this matter. Defendant appears to believe that plaintiffs desire for defendant to require Lovaas intensive methodology for all children with autism, while plaintiffs claim that they are arguing only that defendant's violations of its procedural duties, which prevented Daniel from receiving Lovaas, directly harmed Daniel. In the Court's view, the nature of the claims advanced by plaintiffs, while related to Daniel, do, as defendant claims, impact the entire IDEA scheme. As the Court noted *supra.*, defendant's role under the IDEA is primarily supervisory in nature. The specific questions and answers in regards to appropriate education for a *particular* child are, under the IDEA scheme, left to the local educators. Plaintiffs have available, and successfully utilized, an administrative process for seeking relief from the local educators in regards to Daniel's particular needs.

However, now that plaintiffs have brought the supervisory authority to Court, and to the extent that plaintiffs' claims suggest that Daniel was harmed because defendant's policies and procedures do not require Lovaas for children diagnosed with autism under age 3, such claims do, in practical effect, involve the entire system put in place by defendant. Because defendant is a supervisory entity that sets forth the procedures and policies under the IDEA, plaintiffs' claims will, if successful, for all practical purposes, affect the way defendant approaches and implements its policies with respect to all children with autism.

CHAT test used for identifying children with autism. While plaintiffs repeatedly claim that they do not intend for defendant to offer only a Lovaas based program to all children with autism, their evidence as set forth in their statements of facts indicates that, at least with respect to Daniel,[10] they did expect defendant to offer only a Lovaas based program. For instance, as defendant notes, the plaintiffs stated in their complaint in this matter that every child identified as at risk of autism should receive Lovaas intensive training. In addition, plaintiffs criticize defendant in their response to defendant's statement of facts when they note that notwithstanding the fact that defendant had started putting Lovaas information in the Project ACCESS newsletter by November, 1995, the beginning of the relevant time frame for this case due to the two year statute of limitations, defendant was still indicating that it did not "adopt" any methodology for preschool children with autism or any other children with autism. Similarly, plaintiffs point out that in the 1998 Project ACCESS packet, certain statements indicated that Project ACCESS found school programs providing an eclectic and individualized approach appropriate. In addition, plaintiffs point out the fact that other articles in the Project ACCESS newsletter appeared critical of the Lovaas methodology when comparing it to other methods. Plaintiffs' statements

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[10] Plaintiffs' criticisms of defendant's policies and procedures are highly indicative of plaintiffs' belief that the Lovaas methodology is preferable to other methodology for all children with autism; however, at the summary judgment stage, the Court must believe that plaintiffs have no objection to defendant's espousing of other methodologies for treating autistic children if plaintiffs assert that they have no objection to the use of other policies and practices for the treatment of autism.

and criticisms underscore the fact that they believe that Lovaas should be required, at least with respect to Daniel, to the exclusion of other methods.

The Court finds that plaintiffs' desire for the best possible education for Daniel is highly commendable, and his response to the Lovaas-style program is a credit to their unrelenting efforts to ensure that he receives the best possible education; however, these facts alone are not sufficient for the Court to conclude that defendant is liable to plaintiffs under the IDEA under the facts of this case. As the *Blackmon* court noted, the IDEA does not require "a school district to provide a child with the specific educational placement that her parents prefer." 198 F.3d at 658 (citation omitted); *see also Gill v. Columbia Sch. Dist.*, Defendant's Exhibit A at 18 (noting that at the "time the IEP was being prepared, the Lovaas program was not accepted in the educational community as the only sound method of educating autistic children" and that other "educational approaches were endorsed by educational experts who testified"). Moreover, were this Court to hold the Lovaas style methodology above the eclectic based approach advocated by Project ACCESS, the Court would, in doing so, be imposing "its own theories of education on the school District and reject[ing] the significant expertise of school authorities." *Id.* at 660. The Court does not believe that courts should decide, after listening to experts, that one methodology is preferred over another in an area where the scientific evidence is admittedly

nonconclusive[11] in this regard.[12] For all these reasons,[13] plaintiffs, claim with respect to child find must fail as a matter of law and shall be dismissed.

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[11] As an example of the level of inconclusive evidence in regards to children with autism, the Court notes that plaintiffs have, throughout their arguments, taken issue with the materials submitted by Project ACCESS stating that autism is a lifelong disability, that there is no "cure" for autism, and that 85% of individuals with autism are retarded and 50% non-verbal; however, as defendant notes, Dr. Meinhold, plaintiffs' own expert, testified at her deposition that there was only a "potential cure for a small percentage of kids with autism." In addition, expert Tristram Smith agreed with the statement that there's no known cure for autism.

[12] The Court also notes that plaintiffs had the opportunity to present the results of Daniel's progress with respect to Lovaas and other issues in the administrative hearing resulting in the settlement agreement with SSD.

[13] The Court also notes that defendant has, after time has passed and further study has been performed in regards to Lovaas, taken steps to initiate discussions in regards to the Lovaas methodology and disseminate information in regards to it. The Court believes that individuals like plaintiffs have, by their actions, urged governmental authorities to take a closer look at the methodology, and for that, they should be commended as well. For instance, the Project ACCESS newsletter has, since 1995, featured articles and other information about the methodology. In addition, Heskett issued a memorandum on May 27, 1998 in regards to parents concerns about ABA and sent an e-mail to a Senator on June 19, 1998 about such techniques. As plaintiffs note, the Governor of the State of Missouri has issued a statement about the methodology. Also, Heskett initiated discussions with the Pennsylvania State Department of Education in regards to Lovaas training. While plaintiffs believe that these actions have come too late to help Daniel, at least with respect to child find procedures, the Court believes that such actions demonstrate that defendant is willing to work with parents, educators, and children by at least holding discussions in regards to these issues. The Court believes that working together in such fashion is one of the goals of the IDEA.

Continued on next page.

D. PLAINTIFFS' CLAIM THAT DEFENDANT FAILED TO PUT IN PLACE PROCEDURES FOR ADOPTING, AND TO DISSEMINATE INFORMATION REGARDS TO, PROMISING PRACTICES

In their second claim based on alleged procedural failures by defendant, plaintiffs claim that defendant failed to disseminate information regarding effective educational techniques and to put in place proper procedures for adopting promising practices so that the local school districts can educate children within the state in regards to autism. The pre-1997 §§ 5 1413 (a) (3) (B) (ii) and (iii) of the IDEA,[14] which remained in effect until

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Footnote 13 contiued.

In addition, the Court does not find that defendant should be faulted for not taking these actions sooner. As even plaintiffs admit, the Lovaas methodology and the CHAT test are still not accepted as the only methods useful for identifying and educating children with autism.

[14] Section 1413(a)(3) required each state to have "a comprehensive system of personnel development that shall include

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(B) a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this subchapter are appropriately and adequately prepared, including- -

(ii) procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(iii) procedures for adopting, where appropriate, promising practices, materials, and technology."

July 1, 1998, and §§ 1412(a)(14),(15),[15] effective July 1, 1998, placed similar requirements upon state agencies like defendant. In addition, the regulatory provisions in 34 C.F.R. SS 300.382(b),(c) contain substantially similar requirements.[16] Plaintiffs allege that defendant violated these regulatory and statutory provisions by not making local educators aware of "significant knowledge derived from education research" and by not having in place a procedure for "adopting, if appropriate, promising practices, materials, and technology, proven effec-

[15] These provisions provide as follows:

> (a) In general. A State is eligible for assistance . . . if the State demonstrates . . .that the State has in effect policies and procedures to ensure that it meets each of the following conditions:
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> *
>
> (14) The State has in effect, consistent with the purposes of this chapter and with section 1435(a)(8) of this title, a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel that meets the requirements for a State improvement plan relating to personnel development in subsections (b)(2)(B) and (c)(3)(D) of section 1453 of this title.
>
> (15)
>
> (A) In general
>
> The State educational agency has established and maintains standards to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained.

[16] The relevant regulatory provisions in 34 C.F.R. §§ 300.382(b) and (c) provide that a state must have a plan for "acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources" as well as "[p]rocedures for adopting, if appropriate, promising practices, materials, and technology, proven effective through research and demonstration."

tive through research and demonstration." Plaintiffs allege that because of these failings, defendant "planned to educate Daniel with inappropriate and outdated special education programming which was not consistent with applicable research findings." As a result, they claim that Daniel was, and is, "being denied a 'free, appropriate public education.'" Having reviewed the evidence submitted by the parties, the Court concludes that plaintiffs' claim against defendant based upon these statutory and regulatory provisions fail as a matter of law for the reasons that follow.

First, with respect to the dissemination of information and the training of individuals with autism, defendant has submitted undisputed evidence of its dissemination of information in regards to children with autism, including information related to the Lovaas methodology, during the relevant statutory period at issue in this case under the applicable statute of limitations. As defendant notes, no evidence suggests that defendant took affirmative action to keep individuals from discovering information about the Lovaas methodology. Moreover, as the Court noted in the Statement of Facts *supra*., it is undisputed that defendant, along with and through Project ACCESS, has held a variety of workshops and published a variety of newsletters with respect to children with autism. Starting in November, 1995, such newsletters included references and articles in regards to the Lovaas methodology.

While plaintiffs take issue with the manner in which Lovaas was presented in these newsletters, the Court finds nothing in the relevant statutory or regulatory provisions at issue which limit the manner in which defendant must disseminate the information. In addition, even if, as plaintiffs suggest, the information was

presented in a negative manner, the Court does not believe that the IDEA statutory provisions or regulations were intended to prevent defendant, as the supervisory authority in charge of administering the IDEA, from comparing and contrasting various educational methods. To the contrary, the Court believes that such comparisons incite debate among scholars and provide helpful information to educators and parents alike.

With respect to the adoption of promising practices, plaintiffs admit that defendant has policies and procedures for adopting such practices, but calls such policies and procedures "deficient." Plaintiffs admit that the 11-92 Innovations Newsletter actually describes defendant's "Effective Practices Model Programs Project." Plaintiffs admit that in order for any particular "program" to receive a nomination to the Effective Practices Model Programs Project, a "program" or "practice" must be in place for one year, receive positive results, be capable of replication, and be outstanding, exemplary and cost-effective. The Court believes that these requirements for nomination are reasonable, as they ensure that a "program" or "practice" is actually effective and capable of use in the state system. Regardless of whether the Court finds them reasonable, however, the fact that such a procedure exists is sufficient for the Court to conclude that defendant has satisfied any duties it has to ensure that promising practices are adopted. The Court does not believe that defendant fails in this regard simply because it has not actually adopted the policy preferred by plaintiffs.

Thus, it appears that plaintiffs' claims that defendant fails to disseminate information and adopt promising practices (i.e. Lovaas) is premised upon plaintiffs' belief that the Lovaas methodology is superior to all other

methodologies for educating children with autism. Again, the Court notes that plaintiffs had the opportunity, and utilized such opportunity, to pursue a clam of this nature in regards to Daniel's specific IEP through the administrative process in place under the IDEA. In indicating that defendant has failed in its duties by not adopting or disseminating as much, or as positive, information as plaintiffs would like in regards to Lovaas, plaintiffs are attempting to impose their own educational choice upon the state of Missouri for children with autism. The Court believes that defendant, as the supervisory body under the IDEA, not the body responsible for specifically picking an IEP for each individual student, should not be forced to "adopt" any particular methodology, especially when, as even plaintiffs admit, such methodology is not accepted as the only manner for educating children with autism.

The Court believes a contrary finding with respect to this issue would violate the Eight Circuit's admonition in *Blackmon* that the IDEA does not require "a school district to provide a child with the specific educational placement that her parents prefer." 198 F.3d at 658 (citation omitted); *see also Gill v. Columbia Sch. Dist.*, Defendant's Exhibit A at 18 (noting that at the "time the IEP was being prepared, the Lovaas program was not accepted in the educational community as the only sound method of educating autistic children" and that other "educational approaches were endorsed by educational experts who testified"). Moreover, were this Court to hold the Lovaas style methodology above the eclectic based approach advocated by Project ACCESS and defendant, the Court would, in doing so, be imposing "its own theories of education on the School District and reject[ing] the significant expertise of school authori-

ties." *Id.* at 660. For all these reasons,[17] the Court must conclude, in light of the undisputed facts, that defendant has not failed in its duty to disseminate information or to adopt promising educational practices.[18] Therefore, these claims advanced by plaintiffs against defendant shall be dismissed.

E. PLAINTIFFS' CLAIM THAT DEFENDANT FAILED IN ITS INTERAGENCY AGREEMENT DUTIES.

As another ground of claimed procedural error by defendant, plaintiffs allege that defendant "failed to refer preschool children with educational autism and their parents, including Daniel, to, and coordinate with,

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[17] In addition, the Court notes that plaintiffs rely, for the most part, on the testimony of their expert, Dr. Meinhold, who would testify that the information disseminated by defendant regarding Lovaas is inaccurate and misleading. The Court does not believe that her testimony in this respect is sufficient to survive defendant's Motion for Summary Judgment with respect to this claim in light of the evidence submitted by defendant, especially when, as defendant notes, Dr. Meinhold's degree is in clinical psychology with an expertise in early childhood, families, and developmental disabilities. Moreover, to the extent that her experience and education would qualify her to speak in regards to the dissemination of information, the Court does not believe that any expert testimony is necessary in that regard, because defendant either did disseminate information or did not disseminate information. The Court fails to understand why an expert would need to inform the trier of fact of her opinion with respect to the defendant's actions.

[18] At the very least, the Court does not find, for the reasons set forth *supra.*, that this alleged procedural error is the type of error that would compromise the pupil's right to an appropriate education, seriously hamper the parents' opportunity to participate in the formulation process, or cause a deprivation of educational benefit that would otherwise not have been available as required under *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d at 562.

other community agencies serving children with autism, including, but not limited to, the Department of Human Services Voluntary Services." Plaintiffs complain that as a result of defendant's failure, Daniel was and is "being denied a 'free, appropriate public education.'" Having reviewed the arguments advanced by the parties with respect to this claim advanced by plaintiffs, the Court must conclude that defendant is entitled to summary judgment.

The IDEA expressly states that "'free appropriate public education' means special education and related services." 20 U.S.C. § 1401(8). As defendant notes, the definition of "related services" indicates that whether or not such services are provided requires focus "on the unique needs of each child." *See* 20 U.S.C. § 1401(22) (noting that related services include such services "as may be required to assist a child with a disability to benefit from special education").[19] The Court agrees with defendant that the LEA, which provides the direct services to a child based on his or her unique abilities, not defendant in its supervisory capacity, is the entity that will make decisions in regards to this section.

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[19] Section 1401(22) provides as follows:

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

However, defendant does appear to play a role in ensuring that the proper resources are available for the LEA to provide the necessary "related services." The pre-1997 IDEA required that states "set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies." 20 U.S.C. § 1413(a)(13). *see also* 34 C.F.R. § 300.152 (stating that "[e]ach state plan must set forth policies and procedures for developing and implementing interagency agreements" and such policies and procedures must, *inter alia*, "[d]escribe the role that each of those agencies plays in providing or paying for services required under this part for children with disabilities"). One purpose of the agreements was to "define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education." *Id.* In addition, 20 U.S.C. 1412(a)(12), which became effective June 4, 1997, states that the "Chief Executive Officer or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination" exists "in order to ensure that all services described in subparagraph (B)(I)[20] that are needed to ensure a free appropriate public education are provided."

The undisputed facts in this case clearly establish that defendant has fulfilled these obligations. As defendant notes, plaintiffs do not dispute that services to children from birth to age three are provided through an interagency agreement with the Missouri Department

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[20] In § 20 U.S.C. 1412(a)(12)(B)(I), Congress makes a noninclusive list of statutory provisions containing descriptions of services considered special education or related services.

of Health and the Missouri Department of Health. In addition, plaintiffs do not dispute that defendant works with other Missouri state agencies, including the Missouri Department of Mental Health, to identify and evaluate children with disabilities. Also, defendant has an interagency agreement with the Missouri Department of Mental Health and the Missouri Department of Health, which requires the agencies (1) to notify the public about the full educational opportunity timetable for preschool students and (2) to provide information/referral to the First Steps Program. In late 1996, defendant and the Department of Mental Health entered into an "Autism Interagency Agreement." In April of 1998, a defendant/Department of Health Interagency Subcommittee on Early Intervention Guidelines met to discuss issues related to autism. These undisputed facts are sufficient to establish that defendant has not failed with respect to the coordination and referral efforts with respect to other community agencies.

Perhaps recognizing that the undisputed facts support defendant's request for summary judgment, plaintiffs merely argue in their memorandum in opposition that their "evidence in support of [this claim] relates primarily to the repeated but failed efforts of DESE and DMH to work in a coordinated and cooperative fashion to educate children with autism. The Court finds nothing in the relevant provisions of the IDEA cited *supra*. indicating that parties may bring suit for a violation of such provisions merely because the agencies are unable to reach agreement in regards to an issue that arises while fulfilling the duties under parties' agreement. As defendant notes, the staff of the agencies involved do not always come to a consensus on a particular issue, such as the use of the Lovaas methodology. However, the

Court believes that the purpose of the IDEA is served where, as here, the agencies have agreements in place to serve children's educational needs, and the agencies engage in spirited debate with respect to the proper methods for educating children, particularly where the undisputed facts show that progress is being made in the delivery of ABA services.

Again, however, it appears that plaintiffs are again merely taking issue with defendant's failure to come to a consensus with the other state agencies with respect to the use of the Lovaas methodology. As the Court noted *supra*., this Court should not intervene and alter the arrangements in regards to educational procedures or otherwise cast a deciding vote among educators with respect to any particular educational methodology, especially when the experts appear to agree that there is not a consensus with respect to a "proper" methodology. The Court believes a contrary finding with respect to this issue would violate the Eight Circuit's admonition in *Blackmon* that the IDEA does not require "a school district to provide a child with the specific educational placement that her parents prefer." 198 F.3d at 658 (citation omitted); *see also Gill v. Columbia Sch. Dist.*, Defendant's Exhibit A at 18 (noting that at the "time the IEP was being prepared, the Lovaas program was not accepted in the educational community as the only sound method of educating autistic children" and that other "educational approaches were endorsed by educational experts who testified"). For all these reasons, the Court must conclude, in light of the undisputed facts,

that defendant has not failed in its interagency duties.[21] Therefore, this claim advanced by plaintiffs against defendant shall be dismissed.

F. PLAINTIFFS' CLAIM THAT DEFENDANT FAILED IN ITS DUTIES TO TRAIN AND CERTIFY TEACHERS.

As their last asserted ground of procedural failure on the part of defendant, plaintiffs allege that defendant failed, and continues to fail, "to provide for any certification of teachers of children with autism" and "to train teachers to provide appropriate education to children with autism." Defendant argues that it has fulfilled its duties under the IDEA in this respect. Having considered the arguments advanced by the parties in this regard, the Court concludes that defendant is entitled to summary judgment and plaintiffs' claim must be dismissed.

Congress added "autism" as a specific disability category in 1990. *See* 20 U.S.C. § 1401(a)(1)(A) (pre-1997); 20 U.S.C. §1401(3)(A)(I)(1997). Such a designation is important, because 34 C.F.R. § 300.531 provides that State educational agencies must ensure that "[t]ests and other evaluation materials" are "administered by trained personnel" and that evaluations are "made by a

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[21] At the very least, the Court does not find, for the reasons set forth *supra.*, that this alleged procedural error is the type of error that compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefit that would otherwise not have been available as required under *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d at 562. In addition, as defendant notes, Daniel did receive "related services" such as the Fontbonne school and the Parents as Teachers program.

multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability." As the Court noted in deciding the defendant's Motion to Dismiss, these provisions indicate that educational agencies like defendant must ensure that trained personnel administer tests and ensure that evaluations are made with a group consisting of at least one teacher or other specialist "with knowledge in the area of suspected disability." Autism is a disability under the IDEA. Thus, it appears that state educational agencies must at least ensure that evaluations of children with autism are made by a group consisting of at least one member with knowledge of autism.

Reviewing the undisputed facts in this matter, the Court must conclude that defendant has complied with its duties in this respect. In paragraph 88 of its statement of facts, defendant clearly stated that "defendant requires that LEAs ensure trained personnel administer tests to children with suspected disabilities, and that LEAs ensure evaluations of children with disabilities are made with a group consisting of at least one specialist with knowledge of the suspected disability."[22] In

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[22] In response to this statement of fact, plaintiffs merely state, without support, that defendant is *supposed* to require that LEAs ensure trained personnel administer tests to children with suspected disabilities, and that LEAs ensure evaluations of children with disabilities are made with a group consisting of at least one specialist with knowledge of the suspected disability. Moreover, the Court finds nothing in the record suggesting that defendant does not take steps to ensure that LEAs ensure trained personnel administer tests to children with suspected disabilities, and that LEAs ensure evaluations of children with disabilities are made with a group consisting of at least one specialist with knowledge of the suspected disability. Instead, it appears that plaintiffs are

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addition, while Missouri does not require that children with autism receive teaching from specialized teachers certified to teach autism, the state, like other states, had adopted cross categorical certification of teachers. This method of teaching is predicated on the assumption that while diagnoses may differentiate disabilities, services provided and teaching methods employed for many disabilities are similar. Thus, the method focuses on training teachers in methodologies to support the learning needs of children with disabilities in the general education classroom and other settings as appropriate.

In addition, defendant has presented evidence indicating that Missouri was one of the first Midwestern states to hold an autism teacher training workshop in 1985. In addition, defendant's evidence establishes that the Parents as Teachers National Center trains all Parents as Teachers educators to conduct screening of children with disability. In addition, as noted *supra*.,[23] Project ACCESS distributes information and holds training sessions with respect to children with autism. The Court believes that these facts are sufficient to establish

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Footnote 22 continued.

arguing that defendant has failed in this respect, because of its, and the LEA's, failures with respect to Lovaas. The Court addresses plaintiffs' arguments with respect to Lovaas and teacher training *infra*.

[23] Most of plaintiffs' claims with respect to training of personnel include some of plaintiffs' arguments which the Court addressed and rejected *supra*. For instance, plaintiffs claim that defendant's failure to properly disseminate information seems linked to their claim that teachers are not adequately trained. Without proper dissemination of information, plaintiffs' claim, teachers are unable to properly educate students with autism.

that defendant ensures that trained personnel work to educate and evaluate children with disabilities, including children with autism.

Again, plaintiffs do not appear to specifically take issue with defendant's efforts with respect to teacher training or the provision of teachers for educating children with disabilities; instead, plaintiffs' claim is premised upon their belief that defendant's policies and procedures with respect to teacher training and hiring are inadequate, because they do not include enough training, or hiring, of personnel with respect to the Lovaas methodology. Again, however, the Court finds that it should not intervene and alter the defendant's chosen educational practices or otherwise cast a deciding vote among educators with respect to any particular educational methodology, especially when the experts appear to agree that there is not a consensus with respect to a "proper" methodology. The Court believes a contrary finding with respect to this issue would violate the Eight Circuit's admonition in *Blackmon* that the IDEA does not require "a school district to provide a child with the specific educational placement that her parents prefer." 198 F.3d at 658 (citation omitted); *see also Gill v. Columbia Sch. Dist.*, Defendant's Exhibit A at 18 (noting that at the "time the IEP was being prepared, the Lovaas program was not accepted in the educational community as the only sound method of educating autistic children" and that other "educational approaches were endorsed by educational experts who testified"). For all these reasons, the Court must conclude, in light of the undisputed facts, that defendant has not violated its procedural duties with respect to

this final claim advanced by plaintiffs .[24] Therefore, this claim advanced by plaintiffs against defendant shall be dismissed.

V. CONCLUSION

For the reasons set forth in this memorandum and order, the Court concludes that defendant is entitled to summary judgment on all of plaintiffs' claims[25] against defendant. These claims advanced by plaintiffs against defendant shall be dismissed with prejudice.

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[24] At the very least, the Court does not find, for the reasons set forth *supra*., that this alleged procedural error is the type of error that compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefit that would otherwise not have been available as required under *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d at 562.

[25] Because defendant has not violated the IDEA, plaintiffs' claims under the Rehabilitation Act must fail as a matter of law as well. *Eddins v. Excelsior ISD*, 1997 WL 470353 at *9 (E.D. Tex. Aug. 6, 1997) (noting that "the appropriate federal regulations provide that a school district may establish compliance with the Rehabilitation Act by complying with the requirements imposed under IDEA" and citing, as support for this proposition, §§ 34 C.F.R. 104.33(b)(2), 104.35(d), 104.36 (1996) and *Pasatiempo v. Aizawa*, 103 F.3d 796, 804 (9th Cir. 1996)). In setting forth their arguments, the parties did not indicate that plaintiffs' Rehabilitation Act claims should be analyzed any differently than their claims under the IDEA. In addition, the Court has considered the arguments advanced by the parties with respect to the Eleventh Amendment and the Rehabilitation Act, as well as the IDEA; however, because plaintiffs' claims fail for the reasons set forth *supra*., and because the Eighth Circuit is preparing to hear similar arguments en banc in *Jim C. v. Arkansas Dept. of Educ.*, 197 F.3d 958 (8th Cir. 1999), no discussion in regards to the issue is indicated.

Accordingly,

IT IS HEREBY ORDERED that defendant's defendant's Motion for Summary Judgment [Document #511] is **GRANTED**.

Dated this 9th day of May, 2000.

/s/ E. Richard Webber
E. Richard Webber
UNITED STATES DISTRICT JUDGE